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APPEAL IN ENGLISH LAW.¹

LORD JUSTICE ATKIN.

I PROPOSE to begin with a word or two about the growth of Appeals and then to say something about the present appellate jurisdictions in this country. I suppose, speaking generally, the man who has a decision given against him has a disposition to be discontented with it, and tries to get another decision if he is satisfied that he is in the right. But I should imagine also that in early days the private litigant had a very small say in the matter whether he should, or should not, have the right of appeal. Before the Judiciary and the Executive were distinguishable, when the act of deciding disputes was an act of government, ordinarily performed by the Chieftain or Ruler though perhaps sometimes delegated to a subordinate, in those days, of course, the judge, being also ruler, there were no appeals, and one can only hope that decisions were satisfactory to everyone concerned. Whether the same persons made good rulers and good judges in the days of the Hebrew Judges I do not know; but I do know that I should be very sorry indeed if the two functions, which are of entirely different kinds, were united nowadays. As soon as a ruler began to delegate his function to a subordinate there can be no question that he would from time to time desire to revise the decisions that were arrived at, partly from self-interest, and partly, one may assume, from a sense of justice, knowing that, or thinking that, the decision was wrong and that he could give a better one. And in that kind of way there would gradually emerge a more or less settled system by which decisions would become the subject of review.

¹ An address delivered to the Cambridge University Law Society, March 6, 1926.

Coming to our own times we must at the outset differentiate two classes of courts, the subordinate courts such as the feudal courts, where persons were allowed to administer justice partly by accepted custom, partly by charter, and, on the other hand, the King's Courts administering justice at the same time, and to some extent over coincident areas. It is obvious that it would be to the interest of the King, as wielding paramount authority, to have the power of reviewing the decisions of subordinate courts, including those held by his own officers, and it is not surprising, therefore, to find dating from very early times, one of the forms of procedure which is tantamount to appeal. I mean the procedure by way of the three great prerogative writs issued by the King: the writ of prohibition which prevents a court from exercising jurisdiction which does not belong to it and stops proceedings in it altogether, the writ of mandamus which compels a court to proceed and do justice according to the law, and, lastly, a very important writ, the writ of Certiorari, which brought up decisions at the law courts for review before the King's court to be quashed for excessive jurisdiction or for error if it was placed on record that there was an obvious mistake in law. * It is probably by way of proceedings by prerogative writ that appeals began. * One of the odd parts of the history of our Law is this: that until very recent times, until in fact 1873, apart from appeals on the Chancery side, there was no right of appeal in our courts from a decision of the court on a question of fact. You would think that that was the point on which courts for the most part would go wrong, but owing mainly, I think, to the special nature of the tribunal which determines questions of fact, the courts in this country did not take upon themselves to give to the litigant the right of appealing to get a decision of fact altered. There were applications for a new trial but there were no appeals in the full sense from decisions of fact. But there were appeals on questions of law from very early days.

Passing to the three great common Law Courts—the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer—we find that from them, too, there is no appeal on any question of fact. The facts in those courts were determined entirely and exclusively by Jury, and no court could vary the finding of the Jury. There was, however, from the very earliest days, from the 13th or 14th century, a power of applying for a new trial on the ground that the verdict was—what we call now—against the weight of the evidence. There were also certain unpleasant modes of appeal, which sometimes took the place of a new trial, consisting of purely criminal proceedings against either the defaulting judge or the defaulting jury. We have records of criminal proceedings against judges who have delivered judgment which was wrong—it is often said to have been delivered

in bad faith—and also against juries for giving verdicts which were obviously contrary to the evidence. Such proceedings have now been eliminated. There was also the important power of reserving points of law which might arise in the course of trial and have to be determined by a higher court. That is not really an appeal just as a new trial is not a real appeal. The trial is conducted by a judge out of term time or at the Assizes, and, if at it a question of law arises, it is very natural that he should reserve final judgment to be given by the court, after opportunity for fuller deliberation. It thus happened that a number of important matters of law were decided by the court, making what was then called a rule as to what judgment should be entered in view of the verdict that had been given. That, again, is not what we mean by an appeal.

Leaving such proceedings out of account, we enquire how a decision of the Common Law courts could be called in question. The machinery was that of the writ of error. Error was constituted by having a record made up, which meant that every stage in the proceedings from the making of the declaration onwards was set out on a long roll of parchment, and then, if any mistake, however trifling, were found, there would be an error on the face of the record and the judgment would be set aside. There were very odd rules as to the tribunal to which error would lie. The Court of King's Bench had in theory jurisdiction in error over all other courts in the realm. The result was, that jurisdiction in error lay to the Court of King's Bench from the Court of Common Pleas which had equal jurisdiction as a court of first instance. The same power was claimed by the Court of King's Bench also over the Court of Exchequer, but that was resisted from the beginning, the reason being that the Court of Exchequer had begun by being partly administrative, and that it was closely associated in its origin, at any rate, with questions concerning the King and the King's revenue. Consequently in quite early days a special court had to be set up to which error would lie from the Court of Exchequer. It was an august court and consisted of high official persons, the Lord Chancellor and some other persons assisted by the Judges. From the King's Bench error lay to the House of Lords. That was a very early jurisdiction established in the House of Lords, in virtue of which they dealt with questions of law that were apparent on the record of the Court of King's Bench. It was found that it was inconvenient to proceed only from the Court of King's Bench to the House of Lords. Obviously when the latter was not sitting there would be very considerable delay, and in consequence, in 1585, the Court of Exchequer Chamber was constituted, which was to hear proceedings in error from the Court of King's Bench, intermediate between that Court and the House of Lords. It consisted of the Justices of the Court of Common Pleas and

the Justices of the Court of Exchequer. That machinery existed in the same form up to the year 1830. It was obvious that it was by no means a complete system of appeal, and in some cases it might be questions of law were not expressed in the record at all.

In 1830 the Court of Exchequer Chamber was constituted a Court of Error from the decisions of the three courts—Common Pleas, King's Bench and Exchequer—so that error lay no longer from Common Pleas to King's Bench but from all the courts to the Exchequer Chamber.

In Chancery primary equitable jurisdiction was exercised by the Lord Chancellor at first and also from very early days by the Master of the Rolls. The functions of the latter were originally those of a chief clerk, but developed into authority actually to determine cases. His decisions were subject to review by the Lord Chancellor, an appeal being admissible not merely on questions of law but also on questions of fact. Herein lay an important distinction between appeals on the common law and appeals on the equity side. For questions of fact did and do arise on the Chancery side, not, perhaps, quite as exciting as those on the Common Law side. Such questions could be the subject-matter of appeal. If the decision had been given by the Lord Chancellor, sitting as a court of first instance, he could, if he so desired, review his own decision. You could in fact appeal from the Lord Chancellor to the Lord Chancellor.

In 1813 the Lord Chancellor's court had to be assisted by the appointment of a Vice-Chancellor, and other Vice-Chancellors were appointed later. It obviously became impossible for the Lord Chancellor, whose duties were and are multifarious, to hear appeals from so many courts of first instance, and eventually he was assisted, in 1851, by the appointment under statute of two Lords Justices in Chancery, who could sit either with him or without him to hear Chancery appeals. But at the same time an appeal lay from any one of the Vice-Chancellors or the Master of the Rolls to the Lord Chancellor himself, so that the Chancellor could sit in appeal by himself or he could sit with the Lords Justices.

There is a well-known story in connection with one of the Lord Chancellors. Lord Westbury was a very great master of equity, who had got into trouble because of alleged misuse of his patronage and was somewhat unpopular because of his bitter tongue. A vote of censure was passed in the House of Commons and he resigned, and Lord Cranworth, who was perhaps less esteemed as a lawyer, succeeded him. It was noticed that on Chancery appeals instead of sitting by himself he generally sat with the Lords Justices. Some one asked Lord Westbury, "Why is it that Cranworth always sits with his Lords Justices?" "Oh, probably because of a childish indisposition to sit alone in the dark." It was the same Lord Cranworth of whom the story is

told that, when he appeared to take the great Seal from Queen Victoria, the Queen, who was aware, of course, of what had happened to Lord Westbury, said to Lord Cranworth, "Now my Lord, you see how much better it is to be good than to be clever."

There remains the House of Lords. The House successfully asserted, in 1675, the right to review decisions of the Lord Chancellor. It must have been a somewhat difficult tribunal to appeal before in the old days when the only legal members were Lord Chancellors or Lord Chief Justices, if they had been given peerages, and you could not be sure whether they would attend. No doubt there were cases where you appealed from the Lord Chancellor to the House of Lords and you found the Lord Chancellor sitting there without a colleague, and the circumstances must have presented a little difficulty.

I must say a word of an odd court called the Court of Delegates, which heard Ecclesiastical Appeals and Admiralty Appeals. Originally, Ecclesiastical Appeals lay to the Pope, who had ecclesiastical jurisdiction in this realm, and they seem to have been of an extremely unsatisfactory nature. They were first of all very expensive, and when you had appealed to the Pope you could always re-appeal to the Pope, asking him to alter his decision, and apparently there was no limit to the number of times one could appeal and have the decision varied. The result was that after the Reformation it was obviously necessary to substitute another authority. The King was not prepared to sit himself in person to hear ecclesiastical appeals, so appeals were entrusted to delegates, who were appointed from time to time by Royal Commission, and consisted partly of judges and partly of doctors learned in the Civil Law. Inasmuch as the delegates were only paid a guinea a day, it happened from time to time that the Junior Doctors from Doctors' Commons sat as delegates, and they might be delegates to-day and counsel to-morrow. It was their duty to advise the judges as to what the Ecclesiastical Law was. It is a very remarkable fact that that system lasted until the jurisdiction of the Court of Delegates was transferred to the Privy Council in 1832.

I have not mentioned the County Courts. The modern County Courts (which must, of course, not be confused with the County Court of medieval times) were constituted in 1846, when jurisdiction was given to them to the extent of £20. In 1849 or 1850 the jurisdiction was increased to £50 in contract. Originally in the first Act there was no appeal. Decisions of the court were final. Under the Act of 1850 an appeal was granted, but only on a matter of law, and that was an appeal to the Court of King's Bench. That existed until, by the Judicature Act, the whole system was altered.

In 1873 the Judicature Act set up a Court of Appeal, not quite in its present form but very near it. There were to be six Judges of Appeal,

and the Master of the Rolls was to sit as President of the Court. There was to be an appeal from all the decisions of the lower courts, an appeal by way of re-hearing, with power to reverse not only decisions of law but also determinations of fact. It was originally intended that the Court of Appeal should be the final court, but in the interval before the Act came into force it was felt that this was a mistake, and by the Judicature Act of 1875 the jurisdiction of the House of Lords was restored, and a provision was made for the appointment of Law Lords, that is to say, of peers holding their peerages for life only, who were to be qualified judges and to sit in the House of Lords.

The King's Bench Division retains the appellate jurisdiction of the King's Bench over the decisions of inferior courts, both County Courts and other courts. Such appeals can only be on questions of law. There is a further appeal from the King's Bench Division to the Court of Appeal on such matters, and beyond that to the House of Lords. I do not think it is necessary to say more dealing with the jurisdiction of the Court of King's Bench, which also exercises, as it always has done, the power of granting writs of Prohibition, Mandamus and Certiorari, great instruments for the purpose of regulating the jurisdiction not only of the Lower Courts but of officials who exercise judicial functions.

Appeals from the several divisions of the High Court sitting as courts of first instance lie to the Court of Appeal, which consists of the Master of the Rolls, who presides *ex officio* (the Lord Chief Justice being also President of the Court, and the Lord Chancellor being President *ex officio*), and five Lords Justices of Appeal. They also exercise the right of appeal which is given them by statute, direct from certain Inferior Courts. Appeals in Workmen's Compensation Act cases come direct to the Court of Appeal but only on questions of law. Appeals from the Railway and Canal Court also come, but only on questions of law. There are appeals from the Compensation Court and from one or two other Tribunals, and odd appeals which come direct to the Court of Appeal from County Courts. Speaking generally, we have the power of reviewing all orders and judgments made in civil cases and very wide jurisdiction, as you can imagine, because we have to deal with the whole scope of the English law.

In addition to the Court of Appeal there is the jurisdiction of the House of Lords. That is now exercised under the Appellate Jurisdiction Act by those members of the House of Lords who have held high judicial office, who include, of course, the Lord Chancellor, who presides, and all ex-Lord Chancellors. There are six Lords of Appeal. In the old days one was chosen from Ireland, one from Scotland, and two from England. It also includes all those peers who have been judges and held high judicial office; that is to say, peers who have been

judges of the High Court or Court of Appeal, like Lord Phillimore, Lord Wrenbury, and Lord Darling, and peers who have been members of the Judicial Committee. For distinguished lawyers, who have been created peers without having previously been judges, become qualified to sit if they are appointed members of the Judicial Committee, such membership being high judicial office. It is by this qualification that Lord Oxford and Asquith, Lord Parmoor and Lord James of Hereford, became entitled to exercise the functions of appellate judges in the House of Lords.

The Court that is, in my opinion, by far the greatest and most important of all our tribunals, is the Judicial Committee of the Privy Council. Starting from a committee of the Council for trade and the foreign plantations in the seventeenth century, its jurisdiction and procedure developed during the eighteenth, and it was placed on a statutory basis by Act of Parliament in 1833. All Law Lords are members of it, and all Lords Justices of the Court of Appeal are qualified to sit, though they rarely do so. Members may be appointed from the Dominions, and distinguished judges from Canada, Australia and South Africa have, from time to time, been members. It exercises the most wonderful jurisdiction because the King in Council entertains appeals from all the Dominions. The right of appeal is nowadays restricted by statute: in the case Self-Governing Dominions in some conditions there can only be an appeal by special leave, while in some cases there is no right of appeal at all. The Court has this enormous responsibility that it is the only agency for securing any measure of uniformity in legal development over the whole of this vast Empire. It exercises a jurisdiction which involves knowledge of some four or five, or more, completely different kinds of jurisprudence, dating from the unknown past. It has to decide some cases where the basic law is the common law of England; it entertains appeals which involve consideration of Hindu law; it has to decide appeals involving Mohammedan law; it deals with cases arising out of the Roman-Dutch law, cases involving the old French law of the Channel Islands; with a special code quite peculiar to the ancient law of Malta, with a mixture of Greek and Ottoman law such as obtains in Cyprus. So varied are the cases which may come one after another before a sitting of the Privy Council. There is no other Court in the world that has such a large and extensive jurisdiction. It is sometimes criticised in the Dominions, but I think on the whole its decisions give satisfaction.

So far I have spoken exclusively about appeals in civil cases. I must say a very little about criminal appeals. Originally there was, of course, no appeal on questions of fact determined at a criminal trial. But in early days, if any difficult question did arise as to whether facts constituted crime or not, it was a habit of the judges to reserve

the matter to be talked over in an informal manner after dinner. That was the origin of the tribunal, which, by a statute of the 19th century, became the Court for Crown Cases Reserved. It was not until our own time, in 1907, that the Court of Criminal Appeal was constituted, to hear appeals on questions of fact and of law.

I will now mention one or two problems that arise in connection with appeals. First, how should appeals on issues of fact be dealt with? We have got jurisdiction over such issues in the Court of Appeal, and we exercise it; but it is a very difficult matter to convince the court when such an issue is raised, because it is always objected that the judge has heard the witnesses, and has come to a conclusion as to their capacities and characters, and, it is asked, "Who are you to differ from the judge, who has seen them, when all you have got is a written record?" There is so much truth in that view—though I think it is sometimes exaggerated—that on the whole it is not very often that a case is reversed on a pure question of fact, that is to say, on a question whether the court below was right in believing evidence which, if true, establishes the fact. On the other hand a case in the Court of Appeal very often turns on the question whether there was sufficient evidence to support the conclusion of fact.

Whether the point upon which the appellant relies is a point of law or a point of fact is a very difficult question to settle. I cannot help thinking that very often the answer depends on whether the Court approves of the decision or not. If they do, they say that the issue is one of fact, and they ought not to interfere; if they do not approve, they say it is one of law and they have the right to interfere.

Another problem is that of procedure. Which is better, an appeal by documents or an appeal by oral pleading? Foreign courts give a good deal of consideration to documents prepared by counsel and submitted to the court. Our system always has been to hear counsel, and I think on the whole it is the better. It must be admitted that a good deal of time is occupied, and we have not yet adopted a time limit. In the Supreme Courts of the United States, the counsel prepares most elaborate documentary proofs, which he submits to the justices, and he is then heard in support of his case, with a time limit which ordinarily is one hour but may be exceeded. I asked an American counsel if he only had an hour in which to speak, whether the judges asked questions or not, and he said they did, and that his hour might seriously be encroached upon. But the time is sometimes extended, and there is no doubt that the Supreme Court of the United States functions with great success. There are times in our Courts when it is rather difficult to know whether the argument is proceeding or whether the Court is delivering a series of interlocutory judgments. I remember one case, when I was a junior at the Bar, which excited great interest, a case as

to whether you could obtain an interlocutory injunction against an alleged libel. The Court sat, and, the argument having proceeded all day, about a quarter to four the presiding judge said to counsel: "I suppose, Mr. Cozens-Hardy, you have about concluded your argument?" He said "My Lord, I have not begun yet. The Court has taken the whole time." There were times when it was difficult to address two consecutive sentences to the Court, but, on the whole, I think it is generally accepted that the method by which counsel puts all the difficulties orally is the best.

The last problem that I want to deal with is this. Should there be, in a Court consisting of two or three judges, only one judgment of the Court, or several judgments, including dissenting judgments? It is said that a case loses authority by the fact that there are dissenting judgments. As you know, in the Privy Council only one judgment is given. The retention of this rule is supported mainly on the ground that it adds moral weight to the tribunal which must give the law to different races. But the reason for the existence of the rule is historical. The Council are, traditionally, giving advice to the Crown, and it was the advice of the Council as a body which the Crown wanted, not the advice of the several members. In other courts each judge gives his own opinion. It is a help to the student and the lawyer to know the different reasons that are given, and my own experience leads me to believe that law very often grows out of the excrescences and different variations that are found in judgments. Law as a science would be weakened if we could not resort to the judgments of each judge, and there have been times when dissenting judgments in the ultimate tribunal have been of the greatest value, though tending to throw doubt upon the actual proposition of law that has been decided. I will only mention, by way of illustration, Lord Sumner's dissenting judgment in *Russell v. Russell* [1924] A.C. 687.

I will end with a statement of the proportion between successful and unsuccessful appeals, which may be of interest. This proportion seems to be remarkably stable at about 33 per cent. The number of successful appeals from the lower Courts to the Court of Appeal is about 33 per cent. of the whole number, and the number of successful appeals from the Court of Appeal to the House of Lords is about 33 per cent. There is no reason for believing that if there was a higher tribunal still the proportion of successful appeals to it would not reach at least that figure.

BACON.¹

PROFESSOR W. S. HOLDSWORTH.

OF all Bacon's claims to greatness, his claims as a lawyer are the least of all known. It is strange that this should be so. The law was his profession. Through the law he gained position and honour—Solicitor and Attorney-General and Lord Chancellor. Moreover, I think that those who study his philosophy should remember that Bacon was trained as a student and practitioner in a system of case law, which taught him to construct the rules and principles of law from concrete cases. It is at least arguable that this had some influence on his inductive system of experimental philosophy. Yet there is no doubt that it is as lawyer that Bacon is least known. I think that for this three reasons can be assigned. In the first place, some of his appearances as a lawyer were the least creditable parts of his career. I do not propose to defend his conduct as Lord Chancellor—he himself threw up the defence. But I think that there is more to be said in extenuation of his offence than some of his more severe critics allow—that at any rate was the opinion of Mr. Spedding, to whose great work on Bacon the Master of Trinity has alluded. In the second place, to appreciate Bacon's greatness as a lawyer we must have a considerable knowledge of sixteenth century law, of sixteenth century legal literature, and of sixteenth century lawyers. That is not very common; but it is getting more common; and as a result of this I think it is clear that among sixteenth century lawyers Bacon is pre-eminent. His only rival is Coke. As a lawyer I think that he was Coke's equal, and as a juridical thinker infinitely his superior. Thirdly, the most decisive reason why Bacon's eminence as a lawyer has been so inadequately recognised is the fact that he took the losing side in the politics of the seventeenth century, and the fact that the influence of seventeenth century politics has been immense and long lived.

Let us look at his career as a lawyer. In all the spheres which a lawyer can occupy he was pre-eminent—as an advocate, as a Chancellor, and as a juridical thinker.

As an advocate he combined two qualities which are rarely seen together. He was a master of eloquence and a master of law. Of his

¹ [ED. NOTE.—This address was delivered at a dinner given by the Master and Fellows of Trinity College on the occasion of the tercentenary of Francis Bacon's death. Earlier in the day Professor Holdsworth had received the degree of LL.D. *honoris causa* from the University of Cambridge.]

eloquence there can be no question. He was a *persona grata* both in the House of Commons and in the courts—and that is not very usual. The House of Commons on one occasion was considering whether the Attorney-General ought to be a member of their House, seeing that he is summoned by a writ of assistance to the House of Lords. But, whatever was to be the rule for the future, they resolved to have Bacon. Ben Jonson's testimony to Bacon's eloquence, which the Master of Trinity has quoted, refers to his eloquence in the courts—for it goes on "he had his judges angry and pleased at his devotion."¹ Of his mastery of the law his arguments are a sufficient proof. He was a master of Year Books—of black letter lore; and he marshalled his arguments and his instances with a logical force and a literary form which no lawyer of his day could approach.

Of his judgments as a Chancellor we know little. There were no adequate reports of Chancery proceedings in those days. If he had been reported as fully as Vesey Junior reported Eldon, I have no doubt that English literature would have been enriched. But, in spite of this, we know enough of his achievements to be able to say that he did great services to equity. In the first place, he took a leading part in framing James I's decree in favour of equity, which settled the quarrel between Ellesmere and Coke, and ensured the independent position of equity—a position which was the condition precedent for its continued growth. I think it is safe to say that if it had not continued to grow English law would have been in a parlous state. I have no doubt that it could not have grown if it could only have acted under the strict supervision of the common lawyers. In the second place, he restored harmonious relations with the common law courts. In the third place, he cleared off all the arrears of his court—few later Chancellors could make that boast! In the fourth place, by his orders, he settled the procedure of the court on lines which lasted till the reforms of the nineteenth century. That was a necessary preliminary to the growth of equity—without it Lord Chancellor Nottingham could not have done the work he did in the latter part of the century—could not have won his title of the "father of modern equity."

That he was a great juridical thinker his aphorisms on the law in the eighth book of the *De Augmentis* show. They are the first critical, the first jurisprudential, estimate of English law which had ever been made. And I think we can say that his powers as a juridical thinker were shown in two main directions. In the first place, he made valuable suggestions as to re-casting the rules of English law. Such

¹ The full quotation runs as follows: "His hearers could not cough or look aside from him without loss. He commanded when he spoke, and had his Judges angry and pleased at his devotion. The fear of every man that heard him was that he should make an end."

schemes were then in the air—but in the existing state of politics they were impossible of realisation. For all that, Bacon's suggestions show his prescience. He suggested a recasting of the statute law—his ideas on this subject have been to a great extent affected by the statute law revision Acts. He suggested a Digest of case law—that is not yet realised. He suggested a book of Institutes for learners, to be composed on a plan which resembled that on which Blackstone composed his Commentaries more than a century later. In the second place, he was a great teacher of law. He was a Reader at Gray's Inn. And we are only just beginning to realise how good the Readings of these old Inns of Court Readers were, and the effective way in which they supplemented the defects of the case system by giving systematic surveys of branches of law. Bacon's unfinished Reading on the Statute of Uses shows that he was a great teacher of law. In my opinion the only teacher of law who can be compared with him is the late Professor Maitland—both were consummate lawyers, and in both cases their law was illuminated by literature and philosophy.

Bacon once said that if his suggested re-casting of the law could have been carried out, succeeding ages would have accounted him Coke's superior as a lawyer—perhaps so. But those reforms were impossible then; and, as I said before, he took the losing side in politics. It is easy for us to say that it was absurd to idealise James I—to make of him a patriot king. It is easy for us to say that he underrated the power and ability of Parliament. It is easy for us who know the end of the story. It was not so easy for a man who had been brought up in the traditions of the Tudor monarchy. But those who took the losing side in seventeenth century politics got scant justice from the Whig historians of the last century—I have sometimes thought that an interesting "Dialogue in the Shades" might be composed between Bacon and a famous fellow of this College.

But, we who can at length look at seventeenth century politics through seventeenth century spectacles; we who can look at the great constitutional controversies of that century as matters of law; we who can recognise that the law was often doubtful, and that equally able and honest men could take opposite sides—we can at length do justice to Bacon as a statesman and as a lawyer.

THE IMPERIAL CONFERENCE AND THE CONSTITUTION.¹

PROFESSOR EDWARD JENKS.

I WOULD like to preface what I have to say this evening by one deprecatory remark. I should not venture to tax your patience or reveal my own ignorance by attempting to speak of the Imperial Conference of 1926 as a whole. It was, probably, the most important of the striking series of Colonial and Imperial Conferences which have been held; and it covered an enormous area. It may be that the aspect of it with which alone I propose to deal is not the most important side of its many-sided labours, which included such matters as Inter-Imperial Trade, Defence, Air Communications, Nationality, Overseas Settlement, and Economic Resources. But it is the only one on which I am even moderately competent to speak; and therefore I beg to draw your attention to the fact that I am going to speak of the Imperial Conference only on its constitutional side.

The subject of my Address is "The Imperial Conference and the Constitution," which I may define shortly, without any pretensions to scientific accuracy, as being that part of the politics of the Commonwealth which is crystallised in the forms of government, or at least of association. Now it is fortunate for us that the Conference itself, with all the emphasis which italics can give, has expressed in a very few words what it conceives to be the result of its labours on the constitutional side. I quote from the second paragraph on page 14 of the brief Summary of Proceedings of the Conference to which I have given a reference on the syllabuses which have been handed round. The words are these:—

"They (that is, the Self-Governing Dominions of the Empire) are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

Now I think the first thing that strikes us about that sentence is, that it is declaratory, not legislative; it does not pretend to say that for the future these things shall be, but it says that they are already accomplished facts. And, indeed, in more than one passage of the Report, the Conference is careful to emphasise this aspect of its work, that, so

¹ An address delivered to the Cambridge University Law Society, February 14, 1927.

far as the Constitution is concerned, in relation to the Self-Governing Dominions, it has only put on record what it discovered, after mutual consultation and discussion, to be the true facts of the case.

Obviously, then, in order to understand the meaning of the word "autonomous" in this connection—and it is clear that the word "autonomous" is the key-word of the passage—we have to fall back upon a study of the history of the question. And it may be convenient, I think, to place the development of the British Empire in three successive stages which will, I believe, throw a considerable amount of light upon the present constitutional position of its members.

There was the first stage, in which the Colonies on the eastern seaboard of America, and in the West Indies, were founded in the seventeenth century, mainly by the process of settlement, or colonisation in the strict sense of the word. Of course the centre of this settlement was, or were, the thirteen colonies which subsequently became the first thirteen States of the American Union. These formed, as it were, a unit apart, which, as we know, ultimately ceased to be members of the British Empire. But there is one fact about them which the latest, and certainly not the least distinguished, of Cambridge historians, Dr. George Trevelyan, has so well brought out in his recent book, viz., that they were not all originally English or even British colonies, but that at least the three middle colonies—the present States of the Union known as New York, Delaware, and New Jersey—were originally Dutch and Swedish possessions separating the Cavalier colonies of the South from the Puritan colonies of the North. And it is one of the curious little ironies of history, that the hard fight which the British Navy fought in the seventeenth century to reduce these alien colonies, was one of the immediate causes of the revolution which followed a hundred years later, and which took away the thirteen American colonies from the Empire. Beyond these, again, were the colonies which now form the Atlantic Provinces of the Dominion of Canada and the Dominion of Newfoundland.

Now it would, of course, be a great mistake to suppose that these earliest colonies of the Empire were autocratically governed. If you consider for a moment the settlers of whom they were composed, you will see how unlikely it was that they would have submitted to autocratic government. Broadly speaking, the Puritan colonies in the North were founded by the men who had shaken off the dust of their native land rather than submit in their turn to the Puritan tyranny of Strafford and Laud. The Cavaliers of the southern colonies were the broken soldiers of the English Civil War, who had fled from their native land rather than submit in their turn to the Puritan tyranny of the Cromwellian government. As a matter of fact all these colonies, whatever the form of their development, whether they were so-called

proprietary colonies like Pennsylvania, or Crown colonies in the stricter sense of the term, that is founded under government auspices, or, as appear to have been the case in one or two examples, whether they were governed by the ministers and deacons of their principal congregations, were the very last people in the world to submit to autocratic government. They had charters and grants and liberties. Nevertheless, they had in most cases a Governor appointed by the Crown with an executive of officials responsible to, and, as time went on and communications became more easy, more and more directed from, the Home country. Contrary to the statement that you will find in the official publication known as *The Colonial Office Guide*, the rudiments of a Colonial Office in London, are to be found, not in the Restoration of Charles II, but as far back as the year 1634, in the form of a Committee of the Privy Council charged with the administration of the "Plantations"; and from 1634 until the declaration of American Independence in 1776, this Colonial Office in expanding degree did control, but subject always to a large amount of local self-government, the colonies of the earliest stage.

Then comes the second stage, the long wars of the late 17th and the whole of the 18th century. During that period, a totally different class of colony, or at any rate overseas possession, was added to the British Empire. Not only were there conquests of alien races in Canada and South Africa. Not only was this the period of the long and dramatic duel between Clive and Dupleix for the control of southern India, but also, all over the world, smaller territories and units in the long wars of the Spanish and Austrian Successions, and the seven years war, were added to the Empire. Naturally and inevitably, that stage introduced a new type of government into the Colonial Empire; because it was quite impossible that the Home Government should treat units acquired by hard fighting and conquest, inhabited by alien races and peoples, in the same way as it had treated settlements of its own people. This is of course the source of that particular group of overseas possessions which are technically known at the present day as "Crown Colonies." But here again it would be a mistake to suppose, that even those colonies were subjected to autocratic government in the way that the colonies of the older Empires, for example of France and Spain, had been subjected. Two facts alone, I think, will bring out this truth with irresistible force. The first is, that it had long been, it had been in fact from the very first, a rule that in conquests of this kind, save for special reasons, the private law of the acquired community should not be altered, but that the people should be left to the enjoyment of the legal and customary systems in which they had grown up. That accounts, of course, for the infinite variety of legal questions, arising out of various legal systems, which come before the Judicial

Committee of the Privy Council at the present day for decision and solution. The other fact is the principle, laid down by the great Lord Mansfield in the celebrated case of *Campbell v. Hall* in 1774, that, once a charter conferring representative institutions upon a conquered community has been granted by the Crown (and such charters were freely granted), then even the power to control those communities by an Order in Council, that is by executive decree, is for ever gone, unless it has been expressly reserved in the charter granting representative institutions. Those two facts, I think, are sufficient to show that, even in the case of the dependent communities of alien blood or institutions, the tradition of the British Empire has been from the first that of self-government.

The third stage in the building of the British Empire is of course the overflow of the vast increase of population in the Mother Country produced by the Industrial Revolution at the end of the 18th century. That was the period which peopled, or at any rate settled, the vast Dominions of Australia and New Zealand, and the Prairie and Pacific Provinces of the Dominion of Canada, and which made a beginning of the colonisation of South Africa.

It was out of the second stage of this development of the Empire that Responsible Government, in the sense in which we now understand it, arose, and of course in connection with the premier Dominion of the Empire, the great Dominion of Canada. As I have no doubt you know, Canada at the end of the eighteenth century was not one colony but two. There was the English-speaking colony of Upper Canada, which we now call Ontario, not only English-speaking but mainly populated by settlers of the British race, Protestant in religion, vigorous, progressive, and inclined towards industrial expansion, significantly near the borders of the Great Republic on the South, and therefore peculiarly susceptible to self-government and democratic institutions. In Lower Canada, along the banks of the St. Lawrence, there was a totally different population, French by race and by speech, Catholic in religion, conservative in ideas, and almost wholly agricultural in pursuits. Nevertheless, even this French-speaking colony of Lower Canada, which had of course been acquired by the great victory of General Wolfe in 1759 on the Heights of Abraham, even this colony was largely officered by men of British race and speech; and between them and the French settlers, who formed nine-tenths of the population, there was and had been for many years, deep-seated friction and irritation. Behind both lay an ominous background of Indians and Half-breeds, which on more occasions than one had turned the history of Canada into tragedy.

It is quite true that it is one of the great claims of the younger Pitt to far-seeing statesmanship, that he had, in 1791, drawn a careful line of division between the two colonies, and had given to each a separate

government. Nevertheless, the trouble which had threatened in his time really occurred in the 'thirties of the nineteenth century, and led to the great epoch-making mission of Lord Durham in 1838; and the Report which he brought back in the following year is the great Charter of Responsible Government in the Dominions. Lord Durham, of course, had been a well-known figure in English politics in the famous struggle connected with the Reform Bill of 1832. He was accompanied by two men whose names are distinguished in the annals of the British Empire, Edward Gibbon Wakefield and Charles Buller; and there are disputes as to the precise amount of merit which is to be attributed to these three missionaries respectively, in the historical Report with which they returned. That is a matter which it is not so much for lawyers as for constitutional historians to investigate; at any rate I do not propose to attempt to investigate it this evening. It is sufficient to note, that Lord Durham's report of the year 1839 recommended, as the panacea for the troubles in Canada, the adoption of the principle afterwards so widely known as the principle of Responsible Self-Government; that is to say, of the substitution for an Executive dependent upon the orders of the Colonial Office in Downing Street, of an Executive responsible to the elected legislature of the colony, which legislature should practically have entire control of the internal affairs of the colony itself. It is a little difficult for us, living in the days in which Dominion Self-Government is almost a commonplace, to realise the enormity (as it appeared to the Conservative attitude of 1840) of the proposals made by Lord Durham; and it must, I think, be accounted for righteousness to the statesmen of that period that, apparently with very little hesitation, they determined to apply the new system at once to the colonies in respect of which it was recommended. Lord Durham himself seems to have been very hardly treated; for he was not entrusted with the introduction of his own system. That introduction was entrusted to his son-in-law, Lord Elgin, who, in the 'forties, by judicious and gradual steps, introduced the system into the administration of Canadian affairs. One great risk it was apparently deemed necessary to run, in order to bring the system into effect. The two provinces which Pitt had divided in 1791 were united in 1840, and were not separated again until the establishment of the Federal Dominion in the year 1867. Nevertheless, in spite of this very considerable danger, the new system worked like a charm in allaying the disturbances and jealousies of political life in Canada. What is more, it passed, almost without opposition, from Canada to Australia and New Zealand in the 'fifties, to South Africa in the 'seventies; and it survived the federation of Australia in 1900, as it had survived the federation of Canada and the absorption of the new Provinces in and after 1867; and, though it received a certain check in the establishment of the Union of South

Africa in 1910, it is applied to the Union, though not to the provincial governments there. That is to say, within the comparatively brief space of seventy years, the system of Responsible Self-Government which, after all, was very little more than the adaptation to the Dominions of the system of Cabinet government which had prevailed in England for a century and a half, had, by the end of the nineteenth century practically created no less than five independent governments within the British Empire. Its very latest application, of course, was to the government of Southern Ireland in 1922, when, by a reference, the historical significance of which was not completely understood at the time, the model for constitutional practice and relations in Southern Ireland was expressly made by the Treaty to be referable to the practice of the earliest Dominion—the Dominion of Canada. That sentence in the Treaty links the famous Report of Lord Durham with the Treaty which we all hope, as indeed seems to be the case, has at last brought peace to the distracted Ireland of seven centuries. This brings the story of Dominion self-government to the present time.

The twentieth century had hardly opened when a new phase of Imperial association appeared, in the development of the Conference of Dominion Ministers in London with the Ministers of the United Kingdom, which had begun on the occasion of the celebration of Queen Victoria's first Jubilee in the year 1887. Known at first as the "Colonial Conference," and presided over by the Secretary of State for the Colonies, it acquired the baptismal name of "Imperial Conference" in the year 1907, a year which was significantly marked also by the reorganisation of the Committee of Imperial Defence, tentatively inaugurated in 1903. And it was upon an Empire consisting by that time of six independent governments, that the war broke in the year 1914. The War undoubtedly played a vital part in the further development of the movement which had been tentatively started by the Colonial and Imperial Conference. Let us consider some two or three of the more striking facts of the War from this point of view.

First of all with regard to the military contributions of the Dominions to that world-shaking struggle. The first thing that one notices about them is, of course, the fact that they were entirely voluntary. By this I do not mean that no Dominion passed a compulsory service Act. One or two Dominions did; but there was obviously no attempt on the part of the Imperial Government to impose conscription on any Dominion, or, for the matter of that, upon any dependency. Further than that, although, as inevitably happened when the Dominion troops reached the scene of action, there was co-ordination under the supreme commander of the British forces, yet, as any one can remember who lived through that anxious and trying period, the

amount of autonomy which was retained by the Dominion Forces in everything but actual movements in the field, was perfectly extraordinary. Not only were they for the most part under the immediate command of their own fellow-citizens from the Dominions, but in all that may be called their accessory organisation—their hospitals, their recreation units, their quarters, and the like—it was the avowed object of the Imperial authorities to maintain the autonomy of the Dominion units.

The second fact that we notice in the War is, I think, almost equally striking, namely, that what very little Imperial control over the Empire as a whole was attempted, was attempted, not through Acts of Parliament, but through the Prerogative. As a matter of fact, one of the most unforeseen results of the development of the Cabinet system at home, and Responsible Self-Government in the Dominions, had been to exalt the authority and the popularity of the Crown, and to diminish the authority, I do not like to say popularity, of the Imperial Parliament, so far as Empire-organisation was concerned. Accordingly, what would *a priori* have seemed to be an extraordinary reversion in political tendencies generally, namely, the substitution of the exercise of the Royal Prerogative for the enactment of Parliamentary statutes, took place during the War. For instance, such matters as trading with the enemy (I do not refer, of course, to the Acts of the United Kingdom, which applied only to residents in the United Kingdom, but to trading with the enemy generally throughout the Empire), such matters as contraband, prize jurisdiction, the deportation and control of aliens and the like, so far as they were regulated by Imperial control at all, were regulated through the Prerogative and not through Acts of Parliament. As the War went on, this purely negative attitude which seemed at first to emphasise rather the severance than the union of the Empire and its units, began to change in a most significant way. I need only mention here the appearance of such bodies as the Imperial War Cabinet, and the meetings of the Dominion Prime Ministers in London in the years 1917 and 1918—meetings which, of course, maintained, and this is often overlooked, not merely increasing discussion and mutual counsel between the Imperial Government and the Dominions, but increasing discussion and mutual agreement between the Dominions amongst themselves. That, I think, should never be forgotten, culminating as it did in the celebrated resolution of the year 1918, that for the future the Prime Ministers of the Dominions might communicate directly with the British Prime Minister and one another, and no longer be compelled, as before, to communicate *via* their own Governor General, and through the Colonial Office.

Then, again, as the war at last drew to an end, and victory appeared in sight, the Imperial War Cabinet meetings were renewed to discuss

the terms of peace, not only amongst the Dominions themselves, but even with our Continental Allies and the United States of America. In those conferences, the Dominion Prime Ministers, equally with the Prime Minister of the United Kingdom, took part; and, finally, the war contribution to the growth of the Empire appeared in the separate representation of the Dominions at the Peace Conference, and their separate representation in the League of Nations which grew out of it.

Once more, before coming again to the actual summing up of the Conference of 1926, just let me call your attention to some three or four dates which serve as a kind of link between the War and the Conference of last year.

First, let me remind you that, in the year 1917, the War Conference resolved that a constitutional conference should be held to define the relations of the Dominions to the United Kingdom, as soon as circumstances would permit. In the year 1919 was granted a new Constitution to British India which brought that great Empire nearly, though not quite, into the position of a Self-Governing Dominion. In the year 1920, there occurred the appointment of an independent Canadian Minister at Washington with the full consent of the Imperial Government. In the year 1923, the Imperial Conference thrashed out in detail a series of forms which fully recognised the separate treaty-making powers of the Dominions. And in the year 1925, by the creation of a separate Dominions Office, the status of the Dominions was entirely separated from the status of the other dependencies of the Crown.

That is the situation which the Conference of 1926 had to face; and it explains, I think, the meaning of the paragraph with which I opened my remarks. There is attributed to a famous French Professor of History, the late M. Fustel de Coulanges, who, at the close of a particularly eloquent lecture, was greeted with the unfamiliar sound of applause from his lecture-room, the exclamation: "Ce n'est pas moi qui parle; c'est l'histoire qui parle par ma bouche." That perhaps was a little boastful on the part of the French Professor; but I think we may apply the saying, which at any rate was very striking, to the Conference held last year. And the short summary which I have tried to present to you shows, I think, what I mean when I say, that the resolutions of that Conference on Imperial Relations are not to be taken as having heralded any new Constitution for the British Empire, but merely to have traced the development of the preceding ages, and to have recorded the destination at which it has arrived.

The Conference, it is true, points out that, as a matter of fact, there are some points which still require further consideration and discussion; but it expresses the hope which, in view of the past, I think is by no means an unreasonable hope, that friendly discussion and the settle-

ment of details will remove any difficulties which they may at present contain, as it has removed greater difficulties in the past.

I have mentioned on the syllabus one or two of these points. There is the question of the precise title of His Majesty the King. It is a delicate question from the point of view of sentiment; not, I think, of very great importance from the constitutional standpoint. There is the position of the Governors-General of the Dominions; that is a more practical question, because the Conference laid it down as an established principle, that the Governors-General in the Dominions are no longer to be regarded as the subordinates of any office in London, but as the direct representatives of His Majesty the King, and that they shall stand towards their constitutional advisers in the Dominions in precisely the same attitude which His Majesty himself occupies towards his ministers in the United Kingdom. I believe this matter has caused some searchings of heart. For instance, I have been asked, does it really mean that in future the government of the Empire is to fall into the hands of the King's private secretary? Put picturesquely, are Lord Stamfordham and his successors to "run" the British Empire? I cannot conceive any rational foundation for such a suggestion. Who then is to advise the King upon the appointment of a Governor-General, say of Canada, Australia, or New Zealand? The answer (I may be wrong) seems as a matter of principle to me to be reasonably plain, namely, that, just as the King in matters affecting the United Kingdom takes the advice of his Prime Minister in London, so, in matters affecting Canada, he will take the advice of his Prime Minister in the Dominion, and in the case of Australia that of his Prime Minister in the Commonwealth of Australia, and so forth. And I see no difficulty in applying the principle in that way.

Thirdly, there is the perhaps more difficult question of Dominion legislation. You are probably aware that there exists a certain statute known as the Colonial Laws Validity Act, 1865, though, curiously enough, it is not known to everybody; but those who are familiar with the circumstances under which that statute was passed, know that it was not passed to restrict the capacity of Dominion legislation, but to enlarge it. Still, it does contain the enactment that, wherever a Dominion statute is in conflict with a statute of the Parliament at Westminster, then it is so far, even in the Dominion to which it refers, *ultra vires*. That enactment is inconsistent with the conception of a Self-Governing Empire which has developed since the year 1865.

There is an even more difficult question with regard to Dominions legislation; because the Dominions now, and I think not unreasonably, claim that, in certain circumstances, they must be able to legislate for their citizens beyond their borders. That is obviously going to be a very difficult question. But there, again, I think it is possible to fore-

cast a reasonable adjustment of the relations between the Dominions concerned. Similarly, in the matter of treaties and foreign policy, there is a frank recognition of the greater responsibility of the government of the United Kingdom by virtue of its historic position and its relations with the Continent of Europe. In the words of the Summary (p. 14) "the principles of equality and similarity, appropriate to *status*, do not necessarily extend to function." But again, and the Conference makes no attempt to blink the claim, there lies the claim to independent action, and in all cases the claim to consultation and discussion, of the six independent Self-Governing Dominions of the Empire.

That then is the picture of the British Empire so far, and of course so far only, as the Self-Governing Dominions are concerned, which the Conference lays before us. According to the older idea, the British Empire has ceased to exist. In the mind of a world which believed that Empire could rest only on physical force, or at the very least upon law which was guaranteed in the last resort by physical force, an Empire based upon voluntary co-operation and association was no Empire at all. And we must not be surprised if criticisms of that kind appear, not necessarily from an unfriendly standpoint, amongst those who are not familiar with the inwardness of British institutions. The Empire has even, as was affirmed once more at the Conference, declined to create for itself anything in the nature of a Federal Constitution, that is to say, a Constitution which gives legal rights to the central government as well as to the component States. Is there, then, anything left? What are the ties, if any, which still bind the Empire together?

Three ties, I think, remain. First, there is the tie of sympathy. Sympathy, whatever be its causes, is a spiritual force; and spiritual forces are what is sometimes called "imponderable." A certain school of politicians does not believe in the existence of "imponderables"; another, and, I venture to think, wiser school, whom I should prefer to call statesmen, believes that perhaps they are more important than elements which can be weighed and stated. They cannot, of course, be analysed. Sympathy is like the wind, which "bloweth whither it listeth; ye hear the sound thereof, but ye cannot tell whence it cometh or whither it goeth." Let us only be thankful that it is here; and each of us do his best to increase it. Put into homely and familiar language, the working out of the spiritual bond of sympathy means that peculiarly British process known as "playing the game"; and I do not think that, in an audience consisting of members of the University of Cambridge, I need go in detail to explain the spirit of "playing the game."

Second, there is the tie of mutual interest. Why *should* any member of the British Empire desire to separate from it? There are no

grievances. On the other hand, surely there must be very great advantages in belonging to one of the greatest, if not the very greatest, of political entities in the world, with a history of which, in spite of all its faults and mistakes, no one, I think, taking a broad view of history, need ever be ashamed.

Third, and here I speak with great diffidence because my ignorance of physical science and scientific invention is abysmal. But I cannot help feeling that no person of even average intelligence can help realising the enormous strides which are being made, decade by decade, even one might almost say year by year, in transforming beyond all recognition the means of communication between distant places and peoples. Think only of what electric cables, air-ways, wireless telegraphy, long-distance telephones, and even, what I believe is the very latest invention, television, have done within the last half century to reduce the bounds of time and space, and link together the uttermost ends of the earth. Is it too much to foresee, in the not too distant future, that, should an urgent crisis arise in the life of the Empire, though it would be impossible to assemble in the flesh at London, or Ottawa, or Capetown, or Wellington, or Canberra, the Prime Ministers of an Empire in the throes of that crisis, yet that it might well be possible for them to hear one another's voices at an hour's notice, or assemble to record one another's words, and, if that is any advantage, even to see one another's faces, and thus concert, in the force of a world crisis, a policy which should express the resolution of an united Empire?

THE HAPPY STATE OF THE MODERN LAW STUDENT.¹

MR. JUSTICE MACKINNON.

THE title which I suggested for this address was prompted by some enquiries which I had recently been making into the history of my Inn—which you will forgive me for regarding as the best of the Inns of Court—the Inner Temple. In its records I had been struck with the contrast that was apparent between the life of the law student as there depicted and that of the law student of to-day. I think that in the old times for a man to come to Oxford or Cambridge, before going to London and becoming either a barrister or a solicitor, was very much less common than it is to-day. A certain number of law students no doubt went first to Oxford or Cambridge, but few of them seem to have taken a degree. I had occasion to look into the life history of seven or eight barristers at the end of the 18th century, and I found that each of them was a member of a college, either here or at Oxford, but only two of them took a degree. In those times it was much commoner for a man to spend a year or two, either here or at Oxford, and then to go on to London. The poorer ones, I think, went first to an Inn of Chancery, of which there were about ten attached to the various Inns of Court. The Inner Temple had four of them attached to it—Clement's Inn, Clifford's Inn, New Inn, and Lyon's Inn. Having become a member of an Inn of Chancery a man was received later into an Inn of Court for smaller fees than if he had joined the Inn of Court directly. In those days the training, the pupillage, of the law student at one of the Inns of Court was, in point of time, much more strenuous than to-day. Eight years was the period that a man had to spend from the time when he entered an Inn of Court until he was permitted to be called to the Bar. Even as late as the beginning of the 18th century he had to spend seven years before he could be called to the Bar. Moreover, his attendance at an Inn of Court had to be a great deal more arduous than the eating of those three pleasant dinners each term which now suffices for your performance. On the other hand there was perhaps more in the Inns of Court, in the earlier days, of the social life and the pleasant comradeship that you now get here as undergraduates. In particular, Christmas was very much more of a social function than it is to-day. At Christmas there were feasts, acting of

¹ An address delivered to the Cambridge University Law Society on March 5th, 1927.

plays and masques, and other festivities, for about three weeks or a month, all of which have entirely disappeared to-day. Another contrast is that the numbers in those days in the Inns of Court were extraordinarily small, as compared with those of to-day. Here are one or two details I took down. As late as 1574 the Inner Temple had only thirty-eight barristers, and a hundred and fifty-one other members; and those hundred and fifty-one other members included not only students, but also people who had attained to the dignity of Associates of the Bar. To those of you—I hope they are a majority—who are members of the Inner Temple, it must appear almost inconceivable that there should only be about two hundred members altogether, including Benchers, Barristers and Students, of that Institution in 1574.

Well, as I said, in the earlier times the cheaper way of progressing to an Inn of Court, and of being called to the Bar, was through an Inn of Chancery. I am sorry to say that of what was the actual life of a member of an Inn of Chancery I have no idea whatever, and, indeed, so far as I know, it is a subject on which very little can be known. If there is any one here present with a turn for antiquarian research and for the more picturesque aspects of the legal profession, I would suggest to him a topic, so far as I know entirely unexplored, on which to write an interesting thesis: it would be to try and recover, from such fragmentary references as may remain, some sort of description of the life and training provided by those curious forgotten bodies, the Inns of Chancery.

So much for the life of the students then. The other aspect that strikes me, as being a matter for contrast with to-day, is the nature of their studies. The main portion of that consisted in what were called “exercises of learning.” Each Inn of Court elected every year as its principal officer a man who was called the Reader, and the Reader delivered a series of lectures upon some subject that he selected, usually the exposition of some particular statute. The first method of education for the early law student was to listen to the lectures of the Reader. That system collapsed altogether towards the end of the 17th century. Readers were, and are, still appointed by each Inn of Court, but they have given up reading. In the course of the 17th century it became increasingly common for them to refuse to read. As the century advanced the system arose that a man was appointed Reader, refused to read, and was fined £50. So that eventually, in effect, a Benchers paid a fee of £50 to the funds of his Inn upon being elected to the sinecure office of Reader. It is one of the most curious survivals that Readers are still formally appointed every year, but none of them ever read, and I believe that at the Middle Temple they still pay the fine or fee of £50. I think it is probably true to say that since 1680 no Reader has ever read.

Now, as regards the other "exercises of learning." I jotted down a few details, which I cannot pretend to remember, and therefore propose to read to you. Even the phraseology of the duties of Readers is now unintelligible. I saw in the Inner Temple records an entry of 1667, which speaks of the Readers "breaking their statute at the laver." To break your statute I think meant to announce the statute on which you proposed to lecture. But some one more erudite than I must explain "the laver." Besides listening to the Readers, the student had to do other "exercises of learning" on his own account. There seem to have been at least five different sorts of these. I will read you a few extracts, though I cannot explain what sort of things, or their differences, are referred to. In 1637 the Inner Temple Bench ordered "that every student of this House before he shall be called to the Bar, shall sit and argue eight grand moots, twelve petty moots, and shall argue twelve clerks' common cases, and shall bring in library moots in his turn, and shall sit imparlances, when he shall be charged." The rigour of that requirement was gradually relaxed, as three later orders show. In 1658 "every fellow of this House, before he shall be called to the degree of an utter barrister, shall sit and argue six petty moots, and shall argue four clerks' common cases, and bring in two library moots, and sit two imparlances."

Twenty-five years later, in 1683, it was ordered "that no member of this Society shall be called to the Bar before he be of full seven years' standing, and hath been actually in commons four years of the said seven, and hath performed the exercises following: namely, one imparlance actually to be performed, one library moot, six petty moots, and as many clerks' common cases, and in case of grand readings four grand moots."

Lastly, in 1699, it was ordered "that every gentleman hereafter called to the Bar shall be of full seven years' standing . . . and shall perform one imparlance, one library moot, and a competent number of exercises."

We know, by their happy revival, what moots are. But again I must confess my ignorance; I do not know what was the difference between a grand moot, a petty moot, and a library moot. I suppose a grand moot was a bigger affair than a petty moot. But a library moot was apparently a thing that you "brought in." I am afraid that you will despise me when I add that I do not know what was the nature of a "clerks' common case" or even of an "imparlance." An imparlance seems to have been especially mysterious. The barristers appear to have taken part in it, and it was performed in the Round of the Temple Church; for there is this order as late as 1712: "Nothing shall excuse the masters of the Bar mess, when the exercise [of imparlance] is tendered by the gentlemen under the Bar and taken up by the Bar,

from any default of going down into the Rounds, or about breaking the case there, or giving due commencement to the said exercise, according to the usage of the House."

It is part of the happier fortune I attribute to the modern student that for him the seven years are reduced to three; and while he can attend a moot as, I hope, an agreeable diversion, he is exempt from the welter of grand moots, petty moots, library moots, clerks' common cases and imparlances.

Of the doings of those students destined to be attorneys, little, I think, can be known. In very early times they also became members of an Inn of Court. But as early as 1557 a Parliament of the Inner Temple ordered that "from henceforth there shall be no attorneys, nor other known to be a common solicitor of matters, admitted into this House without the assent and agreement of Parliament." And the ban against attorneys and "common solicitors of matters" was often repeated later. Presumably they got what training they could in the Inns of Chancery. The Inner Temple Bench used to appoint Readers for each of its Inns of Chancery, or rather to send to each the names of three or four barristers of the Inn, from whom "the Rules," as the Governing Body of the Inns of Chancery was called, should choose a Reader. The Reader so appointed in earlier times lectured in the Inn of Chancery, but by the 17th century failure to read, and the consequent imposition of a fine on the defaulter, became increasingly common, and finally even the pretence of carrying out the system was abandoned.

These "exercises of learning" were the equivalent of lectures of to-day. Then, what of the books of your predecessors? Here, I think, your comparative good fortune is very manifest. For until Blackstone began to deliver his lectures at Oxford, and to publish them, the books available for students were very few in number and very poor in quality. The best known of them is called by the summary name of "Doctor and Student," but its fuller title is "A Dialogue between a Doctor of Divinity and a Student of the Laws of England." It was published in Latin apparently in 1523, the author being Christopher St. Germain, who was a member of the Inner Temple, and it remained the leading text book right down to the 18th century. What purports to be the eighteenth edition was published in 1815. If you get hold of a copy you will commiserate the old law student, and realise that he probably turned with delight from its dismal pages to "bring in a library moot" or to "sit an imparlance." The first four sections are (1) of the Law Eternal, (2) of the Law of Reason, (3) of the Law of God, (4) of the Law of Man. From these heights you rapidly descend to lower levels, coming, for instance, to number 13, "*What Sinderesis is.*" And so to 22, the second question of the student, *videlicet*, "if a man that hath lands for a term of life be impanelled upon an inquest and thereupon leeseth issues and

dieth ; whether may those issues be levied upon him in the reversion in conscience as they may be by the law ?” That must have been a stumper for the Doctor of Divinity !

From the latter part of the 17th century, when the “ exercises of learning ” collapsed, until 1753, when Blackstone began his first course of lectures at Oxford, there was no method of teaching law at all. The student had to pick up what he could from a few books like “ Doctor and Student,” and by sitting in Court, and I suppose by some friendly attendance at the Chambers of a barrister. When I say friendly attendance I mean as compared to the modern system of reading in Chambers for a fee to a Junior Barrister, because I do not think that system was invented until quite the end of the 18th century, if not in the early years of the 19th century.

The first edition of Blackstone’s Commentaries was published in 1765, and it marks the beginning of the happier time of the modern law student. Indeed, to an extent that cannot be true of any other branch of learning, Blackstone was the founder of modern legal education. You will forgive me if I find satisfaction in his having been an Oxford man. It was no light task to survey the whole field of English Law, but he had art as well as science. If you look into an early edition, you may perhaps wonder at the complacent optimism with which he regarded the existing law, and even the savage criminal law, as the highest achievement of human wisdom ; but I think, at any rate, you will admire his style. It is full and fruity ; I can always believe the truth of the story which says that he wrote with a bottle of port at his elbow. It is, again, a great tribute to Blackstone that his work, revised, and revised many times again, is still the foundation of the general students’ text book. I have no idea what proportion of the original words of Blackstone survive in the latest edition of Stephen’s Commentaries. But it purports to be based upon that foundation, and to Blackstone, at any rate, is due the credit of the foundation.

Now, I would add, lest I should appear to lay claim to any degree of erudition, that I have never looked into any edition of Stephen, or Blackstone, except the earliest of all the editions of Blackstone, and that purely from the point of view of an interest in literature and style. I fear that I am not ashamed to make a further confession, which is that I have read very few law-books at all. I did not read law at Oxford. I got through the Bar Examinations with the minimum of labour. I do not pretend that in the course of 27 years at the Bar I have not learned a good deal of Law. But I am afraid it is true that if I were unhappily called upon now to go in for the Bar examination I should pass fairly creditably in Common Law and in Criminal Law, and in Evidence, and that sort of thing ; but I should be hopelessly ploughed in Roman Law and Real Property.

I believe you have not observed any blush upon my face as I made that remark, and I would not admit that there is anything paradoxical in a further suggestion. I suggest to you that, in order to be happy, a man needs to work very hard at the business of earning his living, but I add to that the second proposition that he will be happier if his real and keenest interest in life is in something outside the business by which he earns his daily bread. I can understand the contrary view. I can understand the belief of some people that you will be happiest if you have no greater devotion than the work which you have to do to earn your daily bread. Now, if you are inclined to accept those propositions of mine, namely, that in order to be happy you must work hard at earning your living, but that you had better have your keenest interest in something outside it, you might add this as a corollary, viz., that the most important thing is to choose rightly your *πάρεργον*, the delight of your leisure and of your holidays. And you might even conclude that it does not much matter what you choose as the method of earning your living. I think there is a good deal of truth in that. I do not know that it is desirable to choose one that is too repulsive, and, on the whole, perhaps the Law is as good as any. It is quite true that its rewards are exceedingly meagre; indeed, as compared with those achieved by the display of an equal degree of ability and capacity in a commercial career, the rewards of the lawyer are almost despicable. But the Law has one immeasurable advantage, one, so far as I know, enjoyed by no other profession, and that is the existence of the Long Vacation.

Now I hope nobody here present, perhaps conscious of a term ill-spent, has been at all encouraged by my lax views. I would not have him suppose for a moment that ignorance of the Law is a desirable equipment for the successful practice of it. The truth is that to know a great deal of Law is a very useful thing indeed, but there is one thing still better; it does not matter in the least whether you know the Law or not, provided that you enjoy the reputation of knowing it. Success as a barrister or as a solicitor depends not upon your real ability but upon the belief in that ability entertained by actual or prospective clients. And that brings me to a point on which I think I may offer a word of advice, upon the supposition that everybody here present is either a prospective barrister or solicitor. From the plenitude of my experience I can offer you one undoubtedly sound piece of advice, and it is this—*never make a joke*. You have to deal, in either branch of the profession, with clients and their affairs, which often concern their honour, and invariably affect their pocket. They are much too sacred for them to permit anything in the way of wit or humour, and the average client looks upon the jesting lawyer with as much abhorrence as he would upon an archdeacon who was facetious at a funeral. I have

known men gifted with ability, with eloquence, and with learning, but unhappily blessed, or cursed, by nature with a pretty turn for wit or humour; and they have failed. On the other hand, I have known men of moderate ability, of no sort of eloquence, and of little learning, who have been blessed with, or have simulated, a portentous solemnity, that has endeared them to an ever increasing circle of grave and gratified clients. That really is the soundest piece of advice that anybody could give you for the conduct of your prospective career either as barrister or solicitor. Never make a joke. You might suppose that the maxim would admit, so far as a barrister is concerned, of a small addition. You might say "Never make a joke until you are a judge"; and, in theory, of course, that is quite true. But, alas, the years of repression of the humorous faculty, during a career that is usually laborious and often lengthy—the years of repression have so atrophied the power of jesting that the quality of judicial jokes is notoriously poor. Not even the sycophantic applause of a marshal (and I come direct from the Assizes at Cardiff) blinds one to the fact that one has forgotten the trick of it. You may even apply a parodied version of the old French saying: "If the young barrister only dared; if the elderly judge only knew how!" And here, if I may come to the end of these disjointed remarks, is the final aspect of "The happy state of the modern law student"—he is still young and he can jest; he has not yet clients to forbid him. Therefore, while you are as yet law students, make your jests and be merry, for the time will come when you will be barristers or solicitors, and you must not, and perchance the time will come when you are judges, and you cannot.

SOME REFLECTIONS ON THE PHILOSOPHY OF LAW.¹

SIR MAURICE SHELDON AMOS, K.B.E.

IT is recorded in the annals of Ouchronia that Robinson Crusoe, shortly after his return home, met a college friend, who forthwith invited him to deliver a public lecture to his constituents on the "Principles of Political Science as exhibited in an Island State." Ignorance, eagerness to mix once more with his fellow citizens, and an hypnotic state superinduced by the splendour of the topic proposed, concurred to make the unwary traveller accept the invitation. A very few days of reflection were sufficient, however, to reveal to him the full extent of his impotence and of his audacity; and the chronicle goes on to record that he hastily put his affairs in order, and set sail without delay upon his second voyage. I have felt much sympathy in the last few weeks with Robinson Crusoe in his quandary; but unlike him, I propose to throw myself upon your indulgence, only asking you to make allowance for a nearly life-long absence from the atmosphere of universities, libraries, and great tribunals.

I.

In exploring the domain of legal philosophy it will best suit my present purpose to begin inductively, by considering what lines of approach have been in fact adopted by the principal writers on the subject. And I shall confine myself to moderns.

Legal speculation in England is dominated by three great names: Bentham, Austin, and Maine. I confess that I am embarrassed by Maitland; I am reluctant to refuse him a place in any category of distinction. Yet I think it must be conceded that he gave to history powers which were meant for mankind, and as a historian he has not exercised—I say it with trepidation—so great an influence on our general view of the nature of legal institutions as did Sir Henry Maine. Let me remark in passing, however, that Maitland's claim to recognition as a legal philosopher might well be rested on one remark alone—that in which he observes, speaking of the Justices of the Peace, that they ruled their countrysides judicially, that is to say, without a policy.

In Bentham, Austin, and Maine then we encounter three distinct methods of legal philosophy, what I may call the modernist-utilitarian,

¹ A paper read before the Sociological Society at the London School of Economics.

the analytical and systematic, and the historical. That these do not exhaust the field, will I think, sufficiently appear later, if it is not self-evident. But the schools of thought of which I may be allowed for the present purpose to say that they were founded by these three thinkers pretty well monopolise the somewhat narrow field of English legal speculation. Let me pause for a moment to speak of their subsequent history. Benthamism was killed in battle, long ere its prime. Having set out in the early years of the last century, inspired with a sublime zeal for pure reason, a noble confidence in the powers of the human intellect, and a heroic resolve to "*écraser l'infame*," it was borne to the ground, exhausted after fifty victories, by its old enemy, the historical school—the natural ally of the die-hard and the standpatter.

We may fairly say that the Judicature Acts constituted the expiring effort of Benthamism; and if my information is correct, the death and burial of the sponsors of those reforms have in a large measure prevented the reforms themselves from realising their intended consequences. The law of Contract and the law of Trust have not yet found their synthesis in a law of Voluntary Obligations, as would probably have happened if the contemplated fusion of Equity and Common Law had been effectively realised.

Let me remark, by the way, that I think it is open to doubt whether the Old Guard in politics made the best possible choice of an ally. I could mention at least one piece of modern legislation, highly distasteful to the Conservative mind, which the wisdom of our ancestors was wholly impotent to prevent, but of which I am confident that, in the atmosphere of Latin or Teutonic logic, it would have speedily succumbed to criticism inspired by principle.

Had Benthamism remained active for another half century, it would in all probability have endowed this country with a Code, an achievement which, among other results, would have gone far to give English legal institutions that just measure of influence in the civilised world, which they by no means enjoy at present.

I have sufficiently indicated my suspicion that the historical method in legal studies has, during the last two generations, enjoyed an unduly preponderating share of attention and prestige. Its chief services have undoubtedly been rendered to social history rather than to law regarded as a function of government. To learn that law evolves from status to contract, that fictions enable new wine to be poured into old bottles—such ideas are no doubt an immense contribution to the understanding of the psychology of social architecture. But we have ourselves a duty as social architects, and it is dangerous for the craftsman, who is called upon to solve modern problems, and in doing so to use novel materials, to pay excessive regard to the wisdom and to the follies of past ages. Not only does it tend to make him exaggerate his resemblance to his

ancestors, but, what is more intimately relevant, it tends to make him deify Evolution and to underestimate his own freedom. The chief practical service rendered by our preoccupation with legal origins is to be found, I venture to think, in the effect it has had in enlarging our understanding of backward races subject to our government or influence; and from this point of view it is a matter for regret that the study of early institutions was not more fully developed when we first began to send out governors and missionaries on a large scale. In this connection I wish to take the opportunity of commending to your attention a remarkable little book which has recently appeared—Mr. Kennett's "*Bedouin Justice*." Mr. Kennett is an ex-official of the Frontier Districts Administration in Egypt, an administration which was set up under British military authority during the war, for the purpose of policing the deserts on both sides of the Nile Valley. I have come across no parallel to this book as a sympathetic picture of primitive law in actual operation and of the right attitude thereto of the civilised administrator.

In a brief 180 pages we are taught how wise and effective compurgation may be as a system of judicature; we are even invited to suspend judgment on the merits of trial by ordeal; and above all we are shown how in certain stages of society a fair semblance of inter-tribal law can be maintained without a sovereign.

Mr. Kennett and his colleagues were the first effective sovereigns his administriés had ever encountered, and the rôle to which they wisely confined themselves was that of seeing that the rules of Arab Common law were applied somewhat more speedily, fairly, and effectively than they might otherwise have been. Such an attitude would have been impossible a hundred years ago.

I return from this digression to speak of the third school of English legal thought, the Austinian. It is this school which has created, or at any rate brought into general use, the term "*jurisprudence*" with its distinctively English meaning; and I take it that the underlying idea connoted by this term, in its modern English usage, is that there exists a legitimate and profitable method of envisaging and criticising legal institutions, which is purely logical in character.

Professor Ehrlich, commenting upon the fact that Austin and his followers aimed at developing an "*allgemeine Rechtswissenschaft*," observes that they have found Roman Law a better basis for such a science than the law of their own country. There is, I think, so much truth in this observation that it might be said that English Jurisprudence chiefly consists in an attempt to cast the dry light of the *Corpus Juris* upon the imperfectly reconciled disciplines of Common Law and Equity. I personally believe that the Grundgedanke of this school of writers is a pregnant one, and that its possibilities are far from having been

exhausted. It may be hoped that the future will see the powerful engine of modern logical theory brought to bear upon the Austinian problem. To this subject I shall return.

It must, I think, be admitted that if we contrast the sum total of English contributions to legal theory with our national contribution to the Science of Politics, the former makes a comparatively meagre showing. We cannot boast in the philosophy of law, a galaxy of names like Hobbes, Locke, Burke, Mill, Bagehot, and Fitzjames Stephen, to name only the dead. Law has not, with us, been admitted, as Politics have long been, to a secure and undisputed place among the moral sciences. It is interesting to inquire into the reasons for this disparity. It may be that there is less to be said about law than there is about politics;—though that is not the impression one would get from the examination of a catalogue of German books on *Rechts* and *Staatswissenschaft*. The following are some of the reasons that have occurred to me. One is the smaller importance attached by us to the systematic academic teaching of law as compared with all other civilised States, including America. Legal philosophy is stimulated by the atmosphere of great schools of Law, and is blighted by their absence, or comparative obscurity; and it is to be remembered that a great part of the culture of the educated classes on the Continent of Europe is legal culture. Then I think it is the case that partly owing to this difference in education, and also largely owing to the absence of a Code, we as a nation, educated and uneducated alike, are much less conscious of our law than are the peoples of the Continent. We are less conscious of our national law, and therefore less conscious of law in general. We may be law-abiding; but it is not because we know our law, or believe it to be knowable, or worth knowing, but rather because, as the late Sir Henry Wilson once said, if the Frenchman is half a woman and half a soldier, the Englishman is half a child and half a policeman.

Two other reasons occur to me for our comparative lack of fecundity in legal speculation. One is that even at the present day English substantive law is more governed by procedure, and by notions rooted in procedure, than is the case abroad; and the other,—it is the last I shall give—is one highly to our credit; and that is the far greater importance attached by us to the trial of issues of fact. Everything which is summarised in the expression “the day in court”—a monopoly of the English-speaking world—combines to give a spectacular prominence to such capital questions as “Did he promise?—Did he perform?—Are his allegations true?—Was he in his right mind?”

This, which constitutes, I think, one of the major merits of our judicial life, may have a distinct tendency to obscure in our minds the interest of the principles of pure law.

II.

Turning now to the Continental literature of legal philosophy, and more particularly to the German literature, we find ourselves in the presence of a very wide and highly variegated panorama. I imagine that there are few Englishmen, and I am certainly not one of them, who are competent to pass more than superficial judgments on this formidable accumulation of printed matter.

I conjecture that even the late Lord Acton may have contented himself with a bird's eye view of a literature to which few German thinkers have refrained from making a contribution. I think, indeed, that it must be allowed that it is often somewhat difficult for an Englishman, however genuine his interest in law and in philosophy, to appreciate the precise problem which the German has set himself to solve. Professor John Chipman Gray, who obviously shared this difficulty, attributes it to the "woeful confusion" introduced not only into German, but also into French and Italian legal philosophy, by the failure of the languages of these countries to distinguish between "law" and "right"; the words *Recht*, *droit*, and *diritto*, all alike combine the two meanings. With this forced verbal union of distinct ideas is coupled, in German at any rate, another, from which our own language is not wholly free. Just as we can say significantly that it is not right a man should have such and such a right, so a German can speak even more forcibly and more confusingly, of a *richtiges* or *unrichtiges Recht*. Ein *unrichtiges* aber wohl *rechtmässiges Recht*—what a delirium! Now it would seem that the main psychological effect of the atmosphere created by these ambiguities is to bring the German mind continually back to the search for some higher and more permanent and necessary order of ideas, which is or should be the source, explanation, and model of "*gesetztes Recht*" or positive law.

The idea of a law of Nature, at least with that label, is no longer fashionable; but in more abstract forms the same fundamental conception seems to be continually forcing its way back. Thus we find the theory that the intrinsic unity of law and right, of "*objectives Recht*" and "*subjectives Recht*" is due to the fact that both are expressions of the human will.

A recent writer, Professor Reinach of Göttingen, has made an attempt which, I confess, commands at once my sympathy, admiration, and convinced scepticism, to establish on novel lines an *a priori* "Dogmatik" of legal relations. In his monograph on the "*Apriorische Grundlagen des bürgerlichen Rechtes*," he announces that philosophers have hitherto greatly underestimated the number and variety of *a priori* synthetic propositions, and that law offers a wide

range of hitherto unrecognised truths of this kind. His leading example is furnished by the propositions that a promise gives rise to a claim and a liability—an "Anspruch" and a "Verbindlichkeit"—and that both are extinguished by a release. These propositions are independent of the question whether they hold in natural law, in morals, or in positive law. They are *a priori* synthetic judgments and there is an end of it. The inefficacy in Roman law of the stipulation of a slave to create legal rights and duties was open to criticism, not, as the Roman jurists erroneously admitted, because it was contrary to natural law, but simply because it offended against the nature of things.

Well; I personally leave it at that; I should like to believe it, but as at present advised I cannot.

It is this kind of thing which enables us to understand, what otherwise we might have some difficulty in fully apprehending, exactly what it is that Ihering in his "*Zweck im Recht*," and his follower Ehrlich in his "*Sociologie des Rechtes*," are arguing against. We have to remember that the task which Bentham set out to perform, and partially accomplished, namely, the dethroning of tradition, finds its German parallel in the dethroning of the *a priori*. The ideal of the greatest good of the greatest number is replaced in Germany by the idea of the interest which is, or ought to be, protected by the State because it is useful to Society.

Before we terminate our hasty trip to Germany, let me say a word or two of a book which has, I believe, had a certain reputation, Stammler's "*Lehre von dem richtigen Rechte*." This is a more interesting book than it sounds. It is not, as you might well suppose from the title, a treatise on the threadbare subject which I have already stigmatised of the antithesis between actual and ideal law. The subject of Stammler's curiosity is the fact that law-makers and judges are themselves continually to be found referring to standards of conduct which they do not define, but which they nevertheless invest with the authority of positive law.

These standards are expressed by such terms as "bona fides," "reasonable," "good cause," "just," "moral duty," "good morals" and so forth. Is it possible, asks Stammler in effect, that the immense range of judicially regulated conduct covered by these expressions is incapable of more precise definition? In spite of the imposing dimensions of his work, Stammler does not, I think, get very far in his attempt to answer his own question in the negative. And the reason is that his question ought to be answered in the affirmative. These standards are not intended to be defined; and the reason is one of considerable generality and some interest. It is that here, as in so many other cases in life, we are much more ready to agree on an arbitrator than to agree on the principles to be applied.

It is far more practicable to indicate what kind of person should be called upon to decide whether in a given set of circumstances a surgeon, a chauffeur, or a chartered accountant has observed the due standard of professional skill, than it would be to elaborate an adequate code for those occupations.

This observation permits me, without an unduly violent transition, to comment upon an interesting remark of Ihering's. He confesses to a regret that we moderns have almost completely abandoned the Roman practice of permitting certain authorities, such, for example, as the *praetor urbanus* and the *jurisprudentes*, on whom had been conferred the *jus respondendi*, to make the law for particular cases. The only surviving example of this faculty, says Ihering, is to be found in the right of pardon. To this observation I should like to make the following footnote.

In thinking of examples of law being invented for a particular occasion, we must clearly distinguish between the cases where a decision so pronounced has authority as a precedent *in consimili casu*, and the cases where no such authority is attached to it. To the former category, avowedly and explicitly, belonged not only the inventions of the *praetors* and the *jurisprudentes*, but the decisions of our own Chancellors in earlier days. Even the Common Law judges have allowed the fiction that they did not make new law to wear uncommonly thin. But I wish to suggest that we can also find frequent examples in modern practice of the exercise by a judicial authority of the law-giving power strictly confined to the case in hand, and without the effect of creating precedent. I suggest that this occurs whenever a free judicial discretion is exercised, as, for example, in fixing a penalty, in granting or refusing bail, and in granting or refusing motions in matters of pleading, practice, and costs. That the decisions so given are true decisions of law is shown by the facts that they deal with matters which clearly could be regulated by precise rules of general application, and that we confidently expect that they will not be arbitrary in character—and by the vigilant activity with which the annotators of the White Book endeavour to construct precedents from them. In short English procedure in many of its branches is in a state resembling the present position of the French law of Tort.

May we not also think that, in a similar manner, a jury, when finding that a reasonable standard of care, or prudence, or good faith, has or has not been observed, is inventing law *pro hac vice tantum*?

III.

I may not unreasonably be asked, before I stop, to hazard a personal opinion as to the most hopeful direction for further exploration in the field of legal philosophy.

I believe that the path of advance is to be found in the Austinian tradition; and I should like to submit for your consideration one or two ideas of which I think it possible that fruitful use might be made.

I think it would be profitable to start by giving particular emphasis to two aspects of law—by which I mean, not sociologists' law, or historian's law, but lawyer's law. Lawyer's law is above all things conventional and systematic. It is systematic in the sense that it constitutes, or purports to constitute, a logical edifice of axioms, definitions, and propositions of different types hierarchically ordered; and it is conventional in that it is what we agree that it shall be; the *esse* of the law is what it purports to be. From this point of view the law of England or of any other country may be compared to the rules of a game. If we are playing Rugby football the rules are such and such; if we are playing Association, then you can't pick up the ball and carry it.

It seems to me to be useful to regard the law in this light, and to work out in detail the consequences of the conception—for I do not feel that this has yet been done; and the utility lies not only in the prospect it holds out of enabling us to reach clearer ideas on many points of pure "Systematik," but because it will be very valuable to trace, as this method will alone enable us to do, how far the conception is untrue. And by untrue, I mean, of course, not in accordance with the conception of people like judges and Law Officers, whose opinions make facts, so far as their conceptions and opinions truly represent their action. In this we shall be following the example of the economists, who work out a calculus of economic laws on the basis of clear and simple assumptions—too clear and too simple assumptions—and then correct their premises when the hard part of the work is over.

Mr. Bertrand Russell is credited with the remark that we do not yet know enough logic to be in a position to attack the major problems of general philosophy; and Mr. Keynes makes a similar remark in his treatise on Probability. It seems to be possible, therefore, that we do not yet know enough logic to be able to understand law. Though this is less likely, since, owing to the fact that law is, so to speak, conventional and systematic by definition—essentially man-made—its very essence prevents it containing matter which, like the works of the Creator, seem to defy the intellect.

Nevertheless, as I have already hinted, I think that the possibilities latent in the application of modern logical theory to the law have yet to be explored. I should like to touch upon one or two questions which have occurred to me.

For instance; might it not be useful to introduce into legal analysis the conception of higher and lower types of propositions? The examples which occur to me of higher types of propositions are the

rules of Constitutional law, the law governing judicial institutions, and not least, the rules of Private International Law.

I am tempted, for example, to think that once it is clearly grasped that the principles governing the conflict of laws are propositions of a higher type than the ordinary rules of municipal law, the subject of Renvoi is made very plain.

Then I want to ask what kinds of propositions are included in the legal system. How far do what we should call propositions of abstract legal theory form part of the law? Is the "fiction theory" of the juristic person part of the law of England? I have been told that it is,¹ and that it needs to be repealed. It is not so in France and Germany.

Has the law of England adopted an authoritative theory as to the nature of contract, and the inter-relation of the subjective and objective elements of intention and expression. It is a nice question to decide how far it is desirable for the law to go in affording hospitality to abstractions; and it is perhaps not without practical utility that this question should be asked. The more abstractions the judges propound, the more mistaken they are likely to be; on the other hand, the shyer they are of laying down principles, the less they perform their duty as *legis conditores*.

A self-contained logical system must have axioms, that is to say, primary and fundamental propositions which it takes from elsewhere, and does not pretend or purport to justify. From some extraneous point of view, the axioms may be false; but that is irrelevant. Apart from the axioms of formal logic, I have been able to think of two propositions which, as it appears to me, constitute the axioms of English law. I will call them the Axiom of Sovereignty, and the Axiom of Completeness.

The axiom of sovereignty is a complex one; but its general character may be indicated as follows. An English Court is bound by the Acts duly passed by a lawfully constituted British Imperial Parliament, the later in date overruling the earlier, and by all rules of law which such Parliaments must be taken to have affirmed, explicitly or implicitly. This axiomatic principle requires, for its full statement, to be amplified by definitions of an "act duly passed" and of a "lawfully constituted British Imperial Parliament." The definition of a lawful Parliament will rest upon the Act of Settlement and upon all those relevant statutes and Parliamentary customs which that act must be taken to have implicitly affirmed. It will also incorporate the proposition that Parliament may alter its own constitution, and that it has, in fact, done so on such and such occasions.

It is possible that the axiom ought to define the authority of case-law, though this may perhaps be more properly regarded as resting on the

¹ But see Pollock, *Essays in the Law* (1922), pp. 151—179 Ed.J.

implied authority of Parliament. As a lawyer talking to lawyers, I am indifferent to the annoyance which my reference to implied authority will cause to historians and sociologists.

A revolution, and perhaps the temporary establishment of a *de facto* government, alters the content but not the form of the Axiom of Sovereignty.

Now for the Axiom of Completeness. This axiom states that to every question of law, the solution of which is required for the decision of an actual case, there is an answer. All apparent ambiguities in statutes, and all *lacunæ* in the common law, are illusions destined to be dispelled when the necessity arises—provided, of course, that the parties have the necessary cash. The axiomatic character of this proposition is pleasingly demonstrated by the fact that it is, with equal certainty, indisputable and untrue. It is true only in a Pickwickian or conventional sense, which is all that matters to our profession.

This axiom finds its counterpart in French law, where it is expressed in article 4 of the Civil Code: “Le juge qui refusera de juger, sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.”

But this principle of the completeness of the law is by no means necessary or universal. I have already pointed out, quoting Ihering, that the Romans did not accept it; and a striking modern example of a system which explicitly avows the possible incompleteness of the law is to be found in Switzerland. Article 1 of the Swiss Civil Code lays down that: “A défaut d’une disposition légale applicable, le juge prononce selon le droit coutumier, et, à défaut d’une coutume, selon les règles qu’il établirait s’il avait à faire acte de législateur.”

The same idea is to be found in operation wherever the power of interpreting the law is in any measure reserved to the legislature, as was the case in France prior to the year 1837.

I cannot hope to exhaust, even by an enumeration of the chapter headings, the subject of legal logic. There is much to be said about definitions, and their strange consequences; take for example one of the consequences attached by the Romans to the definition of a slave as a thing—namely, that though abandoned by his master, he did not cease to be a slave, and could be occupied by the finder.

The apparatus of legal reasoning, to say nothing of legal fallacies, offers a wide subject for research: how often, for example, might we not find, that were it not for the Axiom of Completeness, that the logically correct conclusion from all the available material is that there is no law on the subject?

But time and ignorance alike forbid my dwelling on these themes; and I think I may fitly conclude by endeavouring to forestall one at least of the numerous criticisms which I have myself invited. On the

one hand, it may be said, I have suggested that modern English law accepts the Axiom of Completeness; and on the other hand I have suggested that, wherever a judicial authority exercises a discretion, it creates law *pro hac vice* unsheltered by any fiction. This, of course, is the kind of autonomy you find in any progressive science. The science of electro-magnetism is in an analogous position to-day. We could, of course, save our axiom by saying that the law is what the judges will, in fact, decide it to be; but then we should have to admit that it is neither certainly knowable nor certainly self-consistent.

THE PERSONALITY OF AN IDOL.

P. W. DUFF.

IN the spring of 1925, the public fancy was caught for a moment by a Privy Council case¹ involving the legal position of Hindu idols. The Times newspaper discussed it in a leading article. The case was fully reported in India and attracted some attention there; but, though it was also reported here, it does not seem to have interested English lawyers.² Few readers of this Journal are particularly concerned with the technicalities of Hindu law, but the case seems to have for students of jurisprudence a much more general interest.

The facts of the case, an appeal from the High Court of Calcutta, may be briefly summarised. A Calcutta Hindu named Mutty Lal Mullick established and endowed certain idols as household gods: the Thakur Sri Sri Radha Shamsunderji, referred to throughout the case as "the idol"; his consort, the Thakurani Sri Sri Singabahini Debi; and a Salgram Sila or deified stone. The guardianship of the idol passed successively to the founder's widow, who endowed it further with approximately a lac of rupees, to their adopted son Jadulal; and to Jadulal's sons, the parties in this case. The question now at issue was whether under a deed of trust executed by Jadulal the appellant was entitled during his turn as *shebait* or custodian of the idol to remove it to his own residence from the house of worship built for it by Jadulal. Their Lordships were of opinion that the interests of the idol itself and of its female worshippers needed special protection, and advised that the case should be remitted to the High Court with instructions to join the female members of the family and appoint a disinterested next friend to represent the idol.

In giving the opinion of the Board,³ Lord Shaw used language which is worth quoting at some length:

"A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by courts of Law, a 'juristic entity.' It has a juridical status, with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on

¹ *Promatha Nath Mullick v Pradyumna Kumar Mullick* (1925) L.R. 52 Ind. App. 245; 87 Ind. Cas. 305; 23 Allahabad Law Journal Reports, 537; 41 Calcutta Law Journal, 551; (1925) Madras Weekly Notes, 431; 2 Oudh Weekly Notes, 557.

² 41 Calcutta Law Journal, p. 11n; and even in America: Am. Bar Ass. Journ. Vol. II (1925), p. 431.

³ Present: Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali,

analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities, for this doctrine, thus simply stated, is firmly established."

The duties of piety from the time of consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the Law a status as a separate *persona*.

"There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location, and there may, no doubt, also be a variety of other contacts¹ of such *persona* with mundane ideas. But an argument which would reduce a family idol to the position of a mere movable chattel is one to which the Board can give no support.

"The will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the shebait, it be thought that a family idol should change its location, the will of the idol itself, expressed through his guardian, must be given effect to. . . . It is open to an idol acting through his guardian, the shebait, to conduct its worship in its own way at its own place, always on the assumption that the acts of the shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

"It has to be pointed out that the idol is not otherwise represented in the proceedings, though the result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting shebaites. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience.

"Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols."

The propositions of Hindu Law thus laid down are far from new, but courts sitting in this country do not often have occasion to enunciate them; and it may be of interest to analyse some of the statements made and to see what exactly they mean, and what light, if any, they can be made to throw on the vexed question of juristic personality.

It seems clear that their lordships do not attribute to Radha Shamsunderji any strictly human or any supernatural personality. Lord

¹ The Reports give either "contracts" or "contacts." L.R. 52 Ind. App. at p. 257 has contacts.

Shaw would have been surprised if the idol had moved a hand or nodded its head to express its will; and would have put down to indignation any dream in which this *persona* appeared to him and explained what it wanted done. We must therefore assume that when he talks of the idol's will and interests he is using the words in a slightly Pickwickian sense, and try to find out his exact meaning.

Taking first the word interests, this suggests to a student of Rudolf von Jhering or Roscoe Pound a psychological or economic want going behind the law which protects it. Such a want or claim we can hardly attribute to the idol. Even Lord Shaw stops short of saying it would be angry or unhappy if not properly fed and anointed. But we may find an ultimate interest in the many and various individuals who desire or may desire that the worship of the idol shall be duly carried out; or even in society as a whole, which desires that religious observances and endowments in general shall be protected.

If these are the "interests" of the idol, what is its "will?" The only answer to this question seems to be that for legal purposes its will is whatever the law regards as such. The law will no doubt take into account both the interests of the worshippers and the social interest in carrying out the wishes of pious founders. In general, it will presume that the idol's will is correctly interpreted by the person who, by appointment of the founder or by inheritance, occupies the position of *shebait*; but the decision in this case shows that if for any reason the *shebait's* interpretation may conflict with the idol's interests, the court will appoint some disinterested person to decide what, in view of all the interests involved, the idol shall be deemed to want.

It has been necessary to deny the idol interests of its own and a will of its own; but when we come to rights, the case is very different. For interests are a matter of economics or psychology, and wills of psychology or metaphysics; but rights are absolutely within the sphere and under the control of the law. Radha Shamsunderji has no emotions or desires; he is not a psychological unit, and no court or legislature can make him one; but if the Privy Council says he is a juristic entity, then he is. A legal system can withhold all rights from a human being, who is then called a slave; and it can equally bestow rights on a subject other than a human being, which may then properly be called a juristic entity or *persona*¹ and said to have legal personality. This word gives offence to many, who think it necessarily implies something extra-legal, some intrinsic resemblance to a human being; but there is no exact English equivalent for *Rechtsfähigkeit*; "capacity" is already overworked; and "personality" seems to be the best word available. Much confusion might be saved if lawyers using the word in

¹ Though *persona* in classical Roman Law means a human being, not a "juristic entity": Buckland, *Roman Law of Slavery*, 1908, p. 4; 17 *Law Quarterly Review*, p. 180.

argument always made it clear that by " legal personality " they mean simply capacity for rights and liabilities, and that a recognised idol is as clearly a legal person as a man or a corporation. This would at any rate clarify some of the discussions on the real or fictitious nature of juristic personality. For many of the disputants think they are discussing this *Rechtsfähigkeit*, which " rests only in intendment of the law,"¹ and is exactly as real (and as artificial) as a right, a title, or the legal capacity of a natural man; instead of the entity to which this *Rechtsfähigkeit* is attached by the law, and whose reality is a legitimate matter of speculation.

There are no doubt a variety of contrasts of such a *persona* with mundane ideas; but some analogies can be found. It is usual for property to be owned by human beings or groups of human beings: but we are familiar, in charitable trusts, with property not beneficially owned at all. Trusts also provide an example of property rights and the beneficial enjoyment they are created to protect vested in different persons. And for beings endowed with rights and liabilities but having no wills of which the law takes account we may compare the position of very young children and imbeciles.

But the entity which most naturally comes to mind in discussing legal personality is the association or group, corporate or unincorporate. Some of the language used of corporations would apply as well if not better to idols. " Das Criminalrecht hat zu thun mit dem natürlichen Menschen, als einem denkenden, wollenden, fühlenden Wesen. Die juristische Person aber ist kein solches, sondern nur ein Vermögen habendes Wesen, liegt also ganz ausser dem Bereich des Criminalrechts. Ihr reales Daseyn beruht auf dem vertretenden Willen bestimmter einzelner Menschen, der ihr, in Folge einer Fiction, als ihr eigener Wille angerechnet wird. Eine solche Vertretung aber, ohne eigenes Wollen, kann überall nur im Civilrecht, nie im Criminalrecht, beachtet werden."² " Every corporation involves in the first place some real person or persons whose interests are fictitiously attributed to it, and in the second place some real person or persons whose acts are fictitiously imputed to it. A corporation, having neither soul nor body, cannot act save through the agency of some representative in the world of real men."³ Savigny compares a juristic person with a ward or a lunatic, but on his theory, commonly called the Fiction Theory,⁴ the parallel with an idol would be considerably closer. It is certainly possible for the State,

¹ *Sutton's Hospital Case* (1612) 10 Co. Rep. 32 b.

² Savigny, *System des heutigen Römischen Rechts* (1840), Vol. 2, p. 312. " Ganz dasselbe gilt aber auch von den Obligationen aus Delicten," *ibid.*, p. 317. English courts, on the other hand, have held corporations criminally liable, not only for non-feasance, but also for misfeasance, *Regina v. The Great North of England Railway Company* (1816) 9 Q.B.S. 315, and their liability in tort extends even to malicious prosecution, *Cornford v. Carlton Bank* [1899] 1 Q.B. 392 [1900] 1 Q.B. 22; and malicious libel, *Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423.

³ Salmond's *Jurisprudence*, 7th ed. p. 343.

⁴ For this and the other theories see Maitland's classic introduction to his translation of Gierke's *Political Theories of the Middle Age*, 1900 (reprinted 1913), pp. xx ff.

which alone can bestow or confirm legal rights, to treat a corporation as an idol; to empower human beings, whether the corporators, or promoters, or anyone else, to appoint *shebait*s whose acts will vest rights and liabilities in the corporation; and to appoint a next friend when necessary to protect the corporation against the *shebait*s. It is even possible for a sovereign parliament to hold the property of the idolised corporation liable for torts and crimes committed by anyone and under any circumstances that the law may specify; but this would seem unjust in principle and might in America be held not due process of law. The fictitious entity can do no acts, and is therefore obviously unable to appoint an agent; thus the law of principal and agent cannot be applied to it, nor, apparently, the principle of *respondeat superior*. A well drawn statute may give substantially the same results, but a *shebait* can never be a common law agent, and it will need another somewhat elaborate statute to provide for those unincorporated groups—such as clubs, churches, and especially trade unions—which have been the subject of some litigation and much discussion of late years. If all group personality is fictitious, and only the state can impose fictions on the courts, we must reverse the tendency of the last half-century,¹ and go back to Blackstone's dogma² that no association can sue or be sued except a corporation created by leave of the Crown,² or else delegate to individuals the power of founding and endowing fictitious persons, as Muttu Lal Mullick founded and endowed Radha-Shamsunderji.

Few common lawyers like the looks of Savigny's fictitious person when they see it in its true colours; and in order to find a substantial principal for what they desire to call agents, many of them go the length of cutting out the corporate person altogether. The agent is employed by the corporators, whose position is only a peculiar type of common ownership. The law will not attribute rights and duties to an idol, but will make its worshippers entitled and its *shebait*s bound to the performance of the acts in question. The court will ignore the fiction and "contemplate more substantially"³ the human beings concerned. The corporation consists only of a name, which is nothing but a short phrase to save the trouble of enumerating the corporators; and the early Romans and medieval English were right in describing what we generally consider a corporate body as "*municipes*" or (as we should say) "the Mayor, Bailiffs, and Burgesses." This theory, called by Maitland⁴ the Bracket or Expansible Symbol theory, has the authority of Von Jhering,⁵ and is rational and coherent. But it seems

¹ Trade Union Act, 1871; Interpretation Act, 1889, sect. 19; *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426; *United Mine Workers v. Coronado Co.*, 259 U.S. 344, 383-392; *The Status of Trade Unions in England*, by W. M. Geldart, 25 Harvard Law Review, p. 579; Herbert A. Smith, *The Law of Associations*, 1914.

² Commentaries; 468, 472.

³ Marshall, Ch. J., in *Bank of U.S.A. v. Deveaux*, 5 Cranch U.S. at 90.

⁴ *Political Theories*, p. xxiv; cf. C. T. Carr, *Law of Corporations*, 1905, chap. XV.

⁵ *Geist des römischen Rechts*, 5th ed., 1906, Vol. 3, p. 356 f. For a strong expression of this view see Kniep, *Societas Publicanorum*, 1896, 1. 273.

hardly to fit the economic and psychological facts with which the law must deal, and it has been repeatedly and decisively rejected by English courts.¹

There remains a third possibility—to distinguish between idols and corporations. It may seem innocent and even obvious to suggest that a group of men can act in a sense in which an idol cannot, and yet this is still unorthodox and shocking to many, probably to most, English and American lawyers. They almost all agree in saying that a corporation can act only through agents. This implies that a corporation can appoint an agent, but that is all that it can do “itself”;² if a shareholders’ meeting passes three resolutions, one appointing a clerk, one accepting the offer of a contract, and one instigating the commission of a crime, only the first would be the act of the corporation, the other two being either acts of its agents or not acts at all. This might be deducible from a statute, but not from the nature of things; and it is certainly not the language of the courts.

The theory that seeks to meet this difficulty, the “Realist” theory, was first elaborated by Gierke, and can claim the support of Pollock,³ Maitland,⁴ Dicey,⁵ and Geldart.⁶ It maintains that although a group of men acting in concert as a unit is certainly not a human being, and may not be recognised by all psychologists or metaphysicians as the possessor of a unitary will, yet it is an actual existing entity; and when the simple business man talks of a corporation as buying and selling, deciding, promising, and breaking its promises, he is nearer the actual facts of the case than either the Fictionists or the Symbolists. English judges seldom pay more than verbal homage to metaphysics, and when the metaphysicians disagree, a lawyer can surely choose the view that suits his convenience and common sense. The question he has to answer is whether he will or will not recognise that a group of men corporate or unincorporate can perform acts which are not merely the acts of the individuals and yet are real in a very different sense from the will of Radha Shamsunderji or the casual ejection of Richard Roe. No explicit answer has yet been given one way or the other, and it probably never will be; but the trend of decisions⁷ and dicta⁸ seems to show that judges consider an association less like an idol than like a human being.

¹ E. g. *Salomon v. Salomon and Company, Limited* [1897] A.C. 22; *Macaura v. Northern Assurance Co.* [1925] A.C. 619, especially p. 633.

² Maitland, *Political Theories of the Middle Age*, p. xxxix.

³ Has the Common Law received the Fiction Theory of Corporations? 27 *Law Quarterly Review*, p. 219.

⁴ *Political Theories of the Middle Age*, p. xxv. See also his *Collected Papers*, Vol. 3, pp. 210-404.

⁵ *Law and Opinion in England*, p. 154.

⁶ *Legal Personality*. 27 *Law Quarterly Review*, p. 90.

⁷ Especially the Trade Union cases referred to in previous note.

⁸ E. g. “A living thing with a separate existence which cannot be swept aside as a technicality. . . . a legal body clothed with the form prescribed by the Legislature.” Lord Reading, C. J., in *Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co., Limited* [1915], 1 K.B. 893 at 904. Some Symbolist language was used in the House of Lords [1916] 2 A.C. 307, on this case of a British company with 24,999 shares out of 25,000 held by Germans, but the decision went on other grounds: p. 337.

Perhaps they are partly influenced by the sound pragmatic reason that if group personality is only a legal fiction the law can always choose freely whether to see it or not; whereas, if it is real, grave consequences may ensue from shutting our eyes and trying to walk through it. If we do not know whether the idol is alive or not, we shall be on the safe side if we keep out of its reach.

One large concession may be made by a moderate realist to traditional ideas. He urges that the courts should recognise on demand the existence of every group; but this leaves completely open the attitude which the legislature or the courts may take up towards it. They may refuse it all rights and duties, exactly as most legal systems in the past have refused them to some human beings. Future generations may find the idea of a rightless group as offensive as that of a rightless man is to us, but we need not legislate for a hypothetical posterity. And even if we do not treat the group as a slave, we can restrict its capacity as we do an infant's or a married woman's. A realist will always be inclined to favour the attachment of legal rights and duties to groups or associations; but he need not deny the power of the state either to destroy a group and forbid it to meet, or to treat it as a creature whose acts, like an animal's, can create rights and duties only for others, or to give it rights and duties differing from those of the human being in any respects that may be deemed socially expedient. On the whole he will probably be very little distressed by the lip-service of judges to theories which he considers unsound, and will listen with equanimity to language placing corporations on a level with idols, so long as the courts continue to treat all associations as real and living organisms.

THE RIGHT OF ANGARY.

W. I. JENNINGS.

IT was decided by the Court of Appeal (Bankes and Atkin L.JJ., Scrutton L.J. dissenting on another ground), in *Commercial and Estates Co. of Egypt v. Board of Trade*,¹ that the Crown has by prerogative the right to requisition the goods of neutrals found in this country, on payment of compensation, where such seizure is necessary for the defence of the realm. This right corresponds to what is known in International Law as "the right of angary." It is proposed to examine in this paper the nature and extent of this prerogative right.

(a) THE COMMON LAW RIGHT TO SEIZE PROPERTY IN DEFENCE OF THE REALM.

The cases on which the modern decisions as to the prerogative right of seizing property in defence have been founded are the oft-quoted cases of *The King's Prerogative in Saltpetre*² and *The Case of Ship-Money*.³ In the former, it was decided by all the judges that "when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance." There is here no mention of the prerogative. A right which every man has cannot be a prerogative right, for the essential idea of a prerogative right (not properly brought out in Dicey's definition) is that it shall be a pre-eminence enjoyed by the King. The King is, however, specially charged with the defence of the realm, and we therefore find that large prerogative rights are admitted by counsel for the defendant and by the dissenting minority of the Court in the next case which we have to consider.

¹ [1925] 1 K.B. 271. It should be noted that the headnote is faulty, in so far as it states that Scrutton, L.J., dissented from the statement that the act was justifiable as the exercise of a prerogative right. He did not find it necessary to decide this question: see remarks of Scrutton, L.J., in *Netherlands American Steam Navigation v. Procurator-General*. [1926] 1 K.B. 84, 99.

² (1606). 12 Rep. 12.

³ (1637). 3 State Trials, 825.

The Case of Ship-Money has to be used with caution, for it was declared by statute of the 16 Car. 1 c. 14 to be contrary to law, and the judgments of the greater part of the judges are therefore valueless. But it is generally admitted that the elaborate argument of St. John for the defendant and the judgments of Crooke and Hutton JJ. express much that is good law. It was admitted that the Crown has certain prerogative rights of seizing private property where necessity demands it. But St. John contended that these rights were available only "when the course of justice is stopped and the courts of justice are shut up. In such times of war not only His Majesty, but any man may take the goods of a subject within the realm, pull down his house, or burn his corn, to cut off victuals from the enemy, and do all other things that may conduce to the safety of the kingdom, without respect to any man's property, for the laws already established are silent in such time." The modern decisions do not point to such a rigid limitation of prerogative right. They are rather compromises between this view and the decision of the majority of the Court, which was that the King has the authority, which cannot be taken away from him, to do any act necessary for the defence of the kingdom, and that he is sole judge as to what is necessary. The modern doctrine seems to be an extension to all forms of property of the right admitted by Crooke J. in respect of ships: "The King has power to command all, or any persons of his kingdom, to attend with arms to defend the coasts, or other parts of the kingdom; and also by his officers, to arrest the ships of merchants, and others, to go with his navy, to any part of the kingdom, for defence thereof." Such extension is quite logical, for the Court was here dealing specifically with money levied on inland towns for the supply of ships, and there is no *prima facie* case for the limitation to ships of such a right. It can fairly be contended that a general rule of law was being specifically applied to the special case before the Court. Hutton J., moreover, stated the proposition generally: "I do agree in time of war, when there is an enemy in the field, the King may take goods from the subject [where there is] such a danger as tends to the overthrow of the kingdom."

In respect of ships, the law seems clear. Professor Holdsworth has shown¹ that there is long series of precedents in which a right to requisition ships has been exercised. Moreover, the right has been confirmed in a recent case. It was held, in *Crown of Leon v. Admiralty Commissioners*,² by the Court of Appeal, that the seizure of a ship in time of urgent national necessity was justified as an exercise of the prerogative of the Crown. Two things should be noticed about this decision. The first is that the right was not limited to a time of actual invasion; and the second is that it was not claimed as a special preroga-

¹ L.Q.R. Vol. XXXV. 12.

² [1921] 1.K.B. 595.

tive affecting ships only. Darling J. said: "The rule undoubtedly is that the King, acting in regard to what is called prerogative, *regale et legale*, has the right on behalf of his subjects to take their property for the defence of the realm and to protect the interests of the subjects, compensation of course being fairly made."¹ It would thus appear that the prerogative extends to all classes of property, and that in any case the payment of compensation is a necessary accompaniment of its exercise. Against this, however, must be cited a dictum of Lord Parker in *The Zamora*:² "The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown." But, as Atkin L.J. has said:³ "Lord Parker's dictum . . . delivered after the decision in *In re a Petition of Right*,⁴ and before the decision in *Attorney-General v. De Keyser's Royal Hotel*,⁵ is no longer justified by the authorities." Its authority was in any case considerably diminished by the fact that it was delivered in the Judicial Committee sitting in *Prize*; that it was quite immaterial to the case; and that no argument was addressed to the Court, or necessitated by the case, as to the extent of the prerogative.

We have still to discuss, however, whether the dictum of Darling J. is in accordance with the precedents. The only cases which can be adduced, apart from the *Crown of Leon* case itself, are the well-known cases on the prerogative right to seize *land* for purposes of national defence. In *In re a Petition of Right*,⁶ it was decided by the Court of Appeal that the Crown has, by its prerogative, a right to take possession of, and occupy lands or premises for the defence of the realm without paying compensation. The position was, however, obscured by a number of statutory enactments, notably the Defence Act, 1842, providing for the seizure of land in certain ways and on the payment of compensation. The case was therefore distinguished, if not over-ruled, by the House of Lords in *Attorney-General v. De Keyser's Royal Hotel Co.*⁷ It was there held that whatever might have been the rights of the Crown at common law, those rights could now be exercised only in the manner provided by the Defence Act, 1842. The existence of an alternative right by virtue of the royal prerogative would make this Act useless, so that it must have been the intention of the King in Parliament to abridge the royal prerogative so that it could only be exercised in accordance with the statute. "When such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent, that the Crown can only do the particular thing under and in accordance with the

¹ *Ibid.* at p. 605.

² [1916] 2 A.C. 77, 100.

³ *Commercial and Estates Co. of Egypt v. Board of Trade*. [1925] 1 K.B. 271, 296.

⁴ [1915] 3 K.B. 649.

⁵ [1920] A.C. 508.

⁶ [1915] 3 K.B. 649.

⁷ [1920] A.C. 508.

statutory provisions and that its prerogative power to do that thing is in abeyance."¹ It therefore appears that at the present time land can only be seized by the Crown upon payment of compensation, but whether such compensation was payable at common law is still undecided. Lord Parmoor seemed to think that it was necessary; Lord Moulton, on the other hand, thought it was not; and the other Members of the Court expressed no opinion. But the Court of Appeal in the same case had the benefit of a considerable research among public records, and though the search was not exhaustive, it appeared that in every case, both before and after the statutory enactments, the Crown had given compensation. Whether this was *ex lege* or *ex gratia* did not appear, but no petition of right was found in which compensation was claimed. This, however, is equally consistent with the view that there was no need for a petition since the Crown had always paid, and with the view that no petition was presented because there was no right to compensation.

The position at common law is therefore doubtful. The *Saltpetre Case* apparently contemplated putting back the land in the state in which it was found, "so that the owner should not have prejudice in his inheritance," but no mention is made of payment for use of the land. On the other hand, considerable doubt has been cast on the decision in *In re a Petition of Right* that no compensation was payable, and the *De Keyser Case* certainly settles that compensation must be paid for seizure for *administrative* purposes. In any case, it is submitted that land occupies a peculiar position, so that even if no compensation were payable, there is no reason why this rule should extend to chattels. Land is of all forms of property the most permanent; it is not consumed by use, and the worst that can happen is that it can be laid waste. This event seems to be provided for in the *Saltpetre Case*, so that compensation will be payable for damage, even if no rent is payable for occupation. Chattels, on the other hand, are generally consumed by use, and compensation ought therefore to be payable. Ships are less subject to depreciation than most chattels, and yet compensation was held to be payable in the *Crown of Leon Case*. *A fortiori*, therefore, it would be payable in the case of other chattels.

One further point does not appear to have been settled. The right in the *Saltpetre Case* could only be exercised "when enemies come against the realm to the sea-coast." In *In re a Petition of Right*, it was held that such a restriction was impossible in view of the conditions of modern warfare, and that any seizure of property could be justified so long as it was "reasonably necessary for preventing and repelling invasions at the present time."² In the *De Keyser Case*, the property

¹ *Ibid.*, at p. 539 per Lord Atkinson.

² [1915] 3 K.B. at p. 660.

was seized for a purely administrative purpose; but no question was raised as to the right of the Crown to seize it, since otherwise the act of seizure would have been a tort, and the remedy of petition of right would not have been available. Lord Parmoor, however, was evidently of opinion that the seizure was not justified.¹ In the case of chattels, the Courts do not feel themselves so strictly bound by the *Saltpetre Case*, and therefore Lord Reading C.J. stated that there must be "a national emergency, an urgent necessity for taking extreme steps for the protection of the Realm."² It seems probable that the Court will judicially recognise that a state of emergency exists, and will accept the statement of the Executive that there is an urgent necessity for the particular act done.³

In short, therefore, it appears that the Crown has by prerogative the right to seize the property of a subject when, in a state of national emergency, it is urgently necessary for the protection of the realm, upon payment of compensation (at any rate in the case of chattels).

(b) HOW FAR THIS RIGHT COVERS THE SEIZURE OF PROPERTY BELONGING TO FRIENDLY ALIENS.

The precedents which have been cited have reference only to the property of British subjects. But the right of angary is "the right of a belligerent to requisition the goods of *neutrals* found within its territory, or territory of which it is in military occupation."⁴ We have therefore to consider the applicability of the law already considered to the property of neutrals. The subject of a neutral State domiciled or even resident temporarily in this country is for the most part in the position of a British subject. In return for the protection which he receives, he owes a local allegiance to the Crown, and is under the same legal liabilities, in general, as a British subject. We may therefore dismiss his case without further consideration. A "neutral" in International Law, at any rate, according to Anglo-American jurists, is a person domiciled in neutral territory. In other words, the right of angary applies to the property of persons who owe no sort of allegiance to the King. Their property happens to be in this country at the moment when it is urgently desired for the protection of the realm: can the Crown seize it? There is nothing in the cases which provides an argument either for or against. The cases are based purely on the necessity for defence. The Crown in moments of emergency must have some extraordinary power of dealing with property: *salus populi suprema lex*. In such case the general right not

¹ *A-G. v. De Keyser's Royal Hotel* [1920] A.C. at pp. 569, 572.

² *Crown of Leon v. Admiralty Commissioners* [1921] 1 K.B. at p. 604.

³ *Ibid.* at p. 607, per Darling J.

⁴ *The Zamora* [1916] 2 A.C. at p. 101. The latter part of the definition is disputed, but the question is immaterial to our purpose, as we are not concerned with territory in military occupation. See Hall, *International Law* (8th ed.) p. 902 (note) and authorities there cited especially Bullock in *British Year Book of International Law*, 1922-1923, pp 99-130.

to be dispossessed of property becomes subject to the necessities of the moment, and many things which would otherwise be illegal become legal. There is no reason for exempting neutral property in such circumstances. It is true that the occupation of land in the *Saltpetre Case* and the admissions of St. John in the *Ship-Money Case* are based on the fact that the common good is thereby advanced; and it is also true that the neutral receives no benefit from the defence of the realm unless he has other property in the realm. But the neutral loses nothing if he is paid compensation, and the community in general gains. Professor Holdsworth has suggested¹ that the right to requisition ships is based on allegiance; but the reason given in *Crown of Leon v. Admiralty Commissioners*² was, as in all the other cases, the necessity of the seizure for the defence of the realm. It is submitted, therefore, that there is nothing in the cases which prevents the right to seize from being extended to neutral property, and that such an extension is a logical consequence of the common law right.

The question does not appear to have come before the Court until *Commercial and Estates Co. of Egypt v. Ball*.³ This case was brought on the same facts as the later case of *Commercial and Estates Co. of Egypt v. Board of Trade*.⁴ Timber, belonging to the plaintiffs, a neutral company, was lying on a British ship in a neutral port when the ship was requisitioned by the Crown. It was brought to England, partly in that ship and partly in other requisitioned ships, contrary to the express wishes of the owners of the timber. When the ships arrived in England, it was requisitioned by the Timber Controller, ostensibly under the Defence of the Realm Regulations. Bailhache J. held that the seizure was *ultra vires* the Regulations, but was justifiable by virtue of the royal prerogative of angary, on payment of compensation. He could see no distinction between this case and the requisition of property brought into England on a ship captured for alleged carriage of contraband and at the moment in the jurisdiction of the Prize Court, as in *The Zamora*.⁵ Apart from the question as to the similarity between the two cases, which will be discussed later, it should be pointed out here that *The Zamora* was tried by the Judicial Committee sitting in Prize, and therefore administering International Law. The decision of that case was, therefore, merely that the requisitioning by the Crown of property in the hands of a Prize Court was in accordance with the rules of *International Law* provided that certain precautions were taken. Though of great value for what it pretends to decide, *The Zamora* is no precedent for seizure *at common law*. It cannot, therefore, be quoted as an authority in an English Court except after it has been

¹ L.Q.R. Vol. XXXV. 12.

² [1921] 1 K.B. 595.

³ [1920] W.N. 172; 36. T.L.R. 526.

⁴ [1925] 1 K.B. 271.

⁵ [1916] 2 A.C. 77.

proved that the right given by International Law to a State is also a right given by the common law to a subject. ¹

*Commercial and Estates Co. of Egypt v. Board of Trade*¹ came before the Court of Appeal on appeal from the War Compensation Court. It was held by Atkin L.J. that the Right of Angary came within Dicey's definition of the Prerogative:² "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." This right could only be exercised subject to payment of compensation, and Lord Parker's dictum to the contrary in *The Zamora*³ was no longer justified by the authorities. The present case was an exercise of the right of angary, and was therefore an exercise of a "prerogative right." Bankes L.J. found more specifically that the Right of Angary was a right at International Law which had been adopted into the common law in accordance with the principles laid down in the *West Rand Central Gold Mining Co. v. Rex*.⁴ We must therefore first inquire as to the extent of this right in International Law, and then consider how far it can be taken over by the common law.

(c) THE RIGHT OF ANGARY IN INTERNATIONAL LAW.

The definition of the Right of Angary given in *The Zamora* has already been quoted. It is "the right of a belligerent to requisition the goods of neutrals found within its territory, or territory of which it is in military occupation." It is almost exactly the same as that given by Fauchille,⁵ and is in accordance with the definitions of most other jurists. The right itself is recognised as existing by most of the eminent writers on International Law.⁶ Pitt Cobbett says:⁷ "By virtue of this principle embodied in the maxim *salus rei publicæ est suprema lex*, a State, whether belligerent or neutral, either in time of war or peace, may requisition the neutral property found within its protection." It should be noticed that a number of continental writers limit this right to time of war, but since it is based on the doctrine of necessity for defence, there seems no logical basis for this. It will certainly be of more frequent value during war-time, but that is not to say that self-protection from flood, fire, or other Act of God, or against barbarian invaders would not give rise to a right to use the property of aliens if necessity demanded it.

It is assumed by the text-writers that the property which can be seized under the right of angary is property which is temporarily in

¹ [1925]. 1.K.B. 271.

² *Ibid.* 294. Dicey: Law of the Constitution (8th. Ed.) p. 420

³ Quoted *supra*.

⁴ [1905] 2.K.B. 391. 406.

⁵ *Traité de Droit International Public* (1922) Tome 2.p.788.

⁶ Pitt Cobbett: *Leading Cases on International Law* (4th ed.), Vol. II., p. 386 and Hall. *International Law* p. 902 and authorities there quoted,

⁷ *Op. cit.* p. 384.

the country for the purpose of its owner. Pitt Cobbett,¹ however, speaks of property which is "temporarily or accidentally within a belligerent State" as being liable to use or destruction which arises from the necessities of war, and prefers these "necessities" as the ground of the right and not *jus angariae*. It is nowhere stated that it applies to property brought in by the belligerent *invito domino*. Nevertheless, in *The Zamora*² it was held that the right of angary extended to goods in the custody of a prize court, on a ship captured at sea for the alleged carriage of contraband, provided that three rules were observed. The right would not be in accordance with International Law unless (a) the vessel or goods were urgently needed for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, (b) there was a real question to be tried, so that it would be unfair to order an immediate release, and (c) the right was enforced by application to the Prize Court, which was to determine judicially whether, under the particular circumstances of the case, the right was exercisable.³ In other words, it was admitted that this was an extension of the general right, but it was considered that the seizure was not inconsistent with principle so long as adequate safeguards were provided. The second limitation was expressly laid down so as to prevent captures from being made for the special purpose of requisition. Moreover, there were special reasons why the right should be allowed in this case: all beneficial enjoyment of the goods is suspended so long as they are in the custody of the Prize Court, and as, where the capture is *bona fide*, it will generally happen that the goods will be condemned, it is not unreasonable to allow the Crown to take the goods before the decision is made where they are urgently required. But in other cases where goods are brought into the country *invito domino* these reasons do not apply. There is therefore no ground for extending the right of angary to such cases. Further, the goods in *The Zamora* were brought into the country in the exercise of a right of capture recognised by International Law. There is no rule of International Law which compels a neutral subject to keep his property on a British ship when that ship is requisitioned by the Crown. The fact that some of the property was transferred to other ships shows that there were both the time and the opportunity to discharge it in the port.

It is submitted, therefore, that the assimilation by Bailhache J.⁴ and Bankes L.J.⁵ of the present case to *The Zamora* was not warranted by the facts. The goods in the latter were lawfully brought in, and

¹ *Ibid.* p. 377.

² [1916] 2.A.C.77.

³ *Ibid.* at p. 106.

⁴ *Commercial and Estates Co. of Egypt v. Ball* [1920] W.N. 472.

⁵ *Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1.K.B. 271

there were special reasons for this seizure : in the former there were no special reasons, and the transport of the goods was not an act permitted by International Law.

(d) HOW FAR THIS RIGHT CAN BE ADOPTED INTO ENGLISH LAW.

The effect of *West Rand Central Gold Mining Co. v. Rex*¹ and the preceding cases as to the relation of International Law to English Law may best be stated in Westlake's words :² " The English courts must enforce rights given by international law as well as those given by the law of the land in its narrower sense, so far as they fall within their jurisdictions in respect of parties or places, subject to the rules that the King cannot divest or modify private rights by treaty (with the possible exception of treaties of peace or treaties equivalent to those of peace), and that the Courts cannot question acts of state." The word " rights " is here used in rather a peculiar sense. Rights are given by International Law only to States, whereas Municipal Courts usually invoke International Law in suits by an individual. What is meant, therefore, is that Municipal Courts must recognise a right where a rule of International Law gives an individual a benefit ; as, for example, where an ambassador claims a diplomatic immunity.

Now, as we have seen, a State has by International Law the right to seize the property of neutrals found within its territory, on payment of compensation. The benefit of that right rests in the Crown as the executive of the country, and conversely, the benefit of the compensation rests in the owner of the property. There ought therefore to be a prerogative right of the Crown to seize the property in accordance with the rules of International Law and a right in the owner to recover compensation for its seizure. As we saw in the first part of this paper, there is nothing in the common law inconsistent with such a right, nor is there any statute to prevent such rights from taking effect. It is only necessary, therefore, in accordance with Westlake's rule, that the act should be within the jurisdiction of the Court, and that it should not be an " act of state." The former is undoubted, but there may be some difficulty about showing the latter.

The question of what is an " act of state " needs a separate paper, and it has not been settled whether an act committed within the realm affecting only foreigners *outside* the realm is an act of state. Atkin L.J. is of opinion that *Johnstone v. Pedlar*³ decided that an act committed in this country cannot be an act of state.⁴ There are undoubtedly dicta to that effect, but all that was there decided was that an act committed within the realm against a friendly alien *owing a local*

¹ [1905] 2.K.B.391.

² Collected Papers. p. 518.

³ [1921] 2.A.C. 262.

⁴ *Commercial & Estates Co. v. Board of Trade* [1925] 1.K.B. at p. 297

allegiance cannot be an act of state. On the other hand, there is no case in which an act committed within the realm has been held to be an act of state. Since the weight of the dicta in the various cases appears to be in favour of limiting "acts of state" to acts committed against aliens outside the realm, we may, in the absence of a decision on the point, accept that as the law.

(e) CONCLUSION.

We have seen that there is at common law a royal prerogative to seize property in defence of the realm, but that this can probably be exercised only on payment of compensation. There seems to be no adequate reason for confining the right to the property of persons resident in the British Dominions. On the other hand, the state has a right in International Law to seize neutral property found within its jurisdiction when it is urgently required for the defence of the country, on payment of compensation. This right probably extends to property lawfully brought into the country *invito domino*. British courts recognise and apply the principles of International Law so far as they are not inconsistent with the rules of English Law. We have shown that there is no such inconsistency in this case; and therefore submit that the right of angary forms part of the Law of England, and is a prerogative right of the Crown. But no such right exists where the property of neutral subjects is brought into this country against their wishes, and not in pursuance of a legal right. We therefore respectfully suggest that the decisions in the two cases mentioned were based upon a misconception of International Law, and were erroneous.

TRUSTS FOR SALE.

JOHN M. LIGHTWOOD.

OF the various devices for facilitating the disposition of property which conveyancers have invented, the trust for sale has been in the past one of the most useful, and its utility has been greatly extended by the Property Acts of 1925. Most students of the law first come across it in the famous argument of Lord Eldon, then John Scott, in *Ackroyd v. Smithson* (1780, 1 Bro. C.C. 503), and the rebuff he received when, a little later, he argued, or tried to argue, on the other side. “Mr. Scott,” the Chancellor of the Lancaster Chancery Court said to him, “I have read your argument in that case of *Ackroyd v. Smithson*, and I defy you or any man in England to answer it.” That was on the doctrine of conversion, the immediate result of a trust for sale, and the refinements to which the doctrine led formed, till the recent legislation, one of the most important branches of equity. With the abolition of the heir at law, and the distribution, in cases of intestacy, of the proceeds of real estate among the new statutory next of kin, these refinements have become obsolete so far as regards the property of persons dying after 1925, but the immediate operation of a trust for sale—the power conferred on the trustees of making a title to the land—remains.

The Origin of Trusts for Sale.

The trust for sale has been used in wills and also in instruments *inter vivos*. In wills the object has been to create, by the sale of land, a fund out of which debts and legacies could be paid either in aid of or in exoneration of the personal estate, or to facilitate division between children. In instruments *inter vivos*, also, the object appears to have been originally similar—to pay debts or provide portions. But its use as a means of creating a personalty settlement of land—that is, a settlement in which the trusts in favour of the beneficiaries should be the same as in a settlement of pure personal estate, as opposed to the limitation of a strict settlement—appears to be modern. *Fletcher v. Ashburner* (1 Bro. C.C. 497), another leading case on conversion, was decided a year before *Ackroyd v. Smithson*. Both were cases of trusts for sale arising under wills. In *Fletcher v. Ashburner* there was a devise of real estate in Kendal, and all the testator’s personal estate, to trustees in trust to sell so much as should be sufficient to pay his debts, and

then to permit his wife to enjoy the residue during widowhood, and after her decease to sell and divide the proceeds between his son and daughter. On the wife's remarriage, the trust for sale was to take effect immediately after the marriage, and the proceeds were in that case to go to the wife, the son, and the daughter in equal shares. If either son or daughter died before the share was due, that share was to go to the survivor. The daughter died unmarried in the lifetime of her mother and brother. The son died next; then the mother without having remarried. Thus the whole went to the son, and the question was between his heir at law and next of kin. Sir Thomas Sewell M.R. held that the direction for sale converted the real estate into personalty, and it went to the next of kin. In *Ackroyd v. Smithson* a testator bequeathed certain legacies and then devised his real and personal estate on trust for sale and conversion, and to pay thereout the legacies, and divide the surplus among the legatees in proportion to their legacies. Two of the legatees died in the lifetime of the testator. Lord Thurlow held that their shares, so far as they arose from real estate, went to the heir at law. Those, therefore, were cases of conversion and reconversion, respectively.

The cases cited in *Fletcher v. Ashburner* and *Ackroyd v. Smithson* show that trusts for sale in wills, either for payment of debts or legacies, or for division of the proceeds, were common during the middle of the eighteenth century. *Mallabar v. Mallabar* (1735, Cas. t. Talb. 79), *Durour v. Motteux* (1749, 1 Ves. S. 320), and *Digby v. Legard* (1774, 3 P. Wms. 22 note), were cases of the blending of the proceeds of real and personal estate. So, too, perhaps, was *Ogle v. Cook* (1748, cited in *Fletcher v. Ashburner*, 1 Bro. C.C. 501). In *Flanagan v. Flanagan* (1768, cited in *Fletcher v. Ashburner*, p. 500, and in *Oxenden v. Compton* (2 Ves. Jun., p. 77), real estate was directed to be sold in aid of the personal estate. In *Emblyn v. Freeman* (1720, Prec. Ch. 541) the trust to sell affected only real estate. A sum of £200 to be paid out of the proceeds, which was not disposed of, went to the heir at law. *Scudamore v. Scudamore* in the same year (Prec. Ch. 543) was a case of money directed to be laid out in the purchase of land. But with the help of Prof. Holdsworth we can get a little further back. In Vol. VI of the *History of English Law*, where he is dealing with the growth of equity in the latter half of the seventeenth century, he refers to *Randall v. Bookey* (1701, 2 Vern. 425), where land was devised to trustees for sale, and out of the proceeds to pay various legacies, including £100 to the person who was heir at law, but there was no disposition of the surplus. It was held, in anticipation of *Ackroyd v. Smithson*, that it went to the heir at law. And in an earlier case, *Prideux v. Gibben* (1683, 2 Cas. in Ch. 144), land was devised to be sold for the payment of debts. In the same work (Vol. VII, pp. 371,

372) will be found references to wills of 1419 and 1466 directing the sale of land, and the disposition of the proceeds for charitable purposes, or (1636, will of John Hampden) to raise money for portions, or (undated) to purchase the wardship of the testator's son. These have been found in Wills from Doctors Commons and North Country Wills (Surtees Society). So the testamentary trust for sale can be traced back for some five hundred years.

The conveyance on trust for sale is not so easy to trace. The Reports do not seem to help, and it is necessary to examine the Precedent Books. West's Symboleography, published in 1590 (see Holdsworth, V, 389), gives forms of marriage settlements; one is summarised by Prof. Holdsworth (VII, 377); but there does not appear to be any form of a trust for sale. The early precedents, indeed, provide only for strict settlements, and for this purpose two instruments were required; the conveyance to the feoffees and the covenants which stated the purpose of the settlement; a curious anticipation of the new vesting deed and trust instrument. In Vol. III, pp. 250-252, Prof. Holdsworth, in dealing with the early Land Law, takes us back considerably further, but there appears to be no hint of the origin of the settlement by way of trust for sale. Retracing our steps, we naturally look at Orlando Bridgman's "Conveyances." These were drafted in the Commonwealth period, when Bridgman's conveyancing ability was used in the service of his Royalist clients. At the Restoration he became Chief Baron of the Exchequer, and presided in that capacity at the trial of the Regicides. Afterwards he was Chief Justice of the Common Pleas and then Lord Keeper. The "Conveyances" was published in 1689 by his clerk, after his death (Holdsworth, VII, 537, 604). But Bridgman got his title of the "father of modern conveyancing" from his shaping of the strict settlement, and his forms do not contain anything corresponding to the personalty settlement of land, though there is a precedent of a conveyance to trustees on trust to sell for the payment of debts (*Conveyances*, pp. 11, 12). Of about the same date was Brydall's *Ars transferendi dominium: The Law of Conveyancing*, but this does not help. A list of other conveyancing works of the same time is given by Prof. Holdsworth (VI, 688), but they are not readily accessible, and probably would not throw light on settlements by way of trust for sale.

The works which have been referred to were moderate in size, but, when we get to the eighteenth century, the precedent books are folios, and in the manner of those days, and, indeed, up to quite a recent date, there is no separation into paragraphs. There is Lilly's Practical Conveyancer (1719, one volume); it contains a marriage settlement of Bank and South Sea Stock (p. 445), and a creditors' deed of real estate with a conveyance to an assignee and a covenant by him to sell

for the benefit of the creditors (p. 621), but nothing corresponding to the modern personalty settlement of land. There is Horsman's *Precedents in Conveyancing* (1744, three volumes), containing precedents "settled and approved by Gentlemen who were in their time the most eminent Practisers in this branch of the law." The Preface refers to the extended subject-matters of property. The precedents "have for their subject-matter, not only the estates real and personal known to former times, but the new supplies of stocks, bonds and annuities of publick companies, Exchequer annuities, fortunes in Ireland and Holland, and Plantations in America. Materials which have introduced an additional language into Conveyancing." But, while there are numerous strict settlements and settlements of money to be laid out in land, the trust for sale and settlement of the proceeds on the trusts of a personalty settlement has not yet arrived. Where there is personal estate it is either to be realised and invested in the purchase of land, or if it is the wife's, it may be settled to her separate use. But there is a "Marriage Settlement of great variety and containing many uncommon designations" (No. 21, Vol. II, 487)—the great variety requires for its expression 28 folio pages—which settles the wife's portion and the husband South Sea annuities for the benefit of younger children. In Vol. III there is a Precedent (No. 7, p. 401) of a post-nuptial settlement of lands, in which, after the husband's life estate, part are to be sold and the proceeds held on trusts for the husband's wife and his daughter and their issue. Again, there is Newman's "Complete Conveyancer" (1788, three volumes), in which the drafts give the names of the counsel who drew or settled them; also numerous opinions of counsel. It reproduces Horsman's settlement "of great variety," and also the post-nuptial settlement just referred to; but does not appear to carry our search for the personal settlement of real estate any further. Lastly, there is another Precedent book—Wood's "Complete Body of Conveyancing" (5th ed., 1790-3, by John Joseph Powell, 3 volumes). In Vol. III, at p. 646, there is a settlement of Bank and South Sea Stock again—so the South Sea Stock seems to have survived the bursting of the bubble many years before—with powers of appointment, but, as regards trusts for sale, the book does not help.

It is not till we come to the nineteenth century that the personalty settlement of land seems to be in use. The device of a conveyance in trust for sale, with a separate deed declaring the trusts of the proceeds of sale is found in Barton's "Conveyancing" (1811, pp. 398, 420); but there it is used for the purpose of a creditors' deed. Later on in the century, however, all the books have the modern form of marriage settlement of land by way of trust for sale. It is in Martin's "Practice of Conveyancing," IV, 341, the fourth volume of which was in fact compiled by Charles Davidson and published in 1840; in Hughes'

"Precedents in Modern Conveyancing," 2nd ed. (1855), I, 693; and in Davidson's "Precedents in Conveyancing," first published under that name in 1855 as the successor of "Martin." And, of course, it occurs as a common form in all the later books. The chief reason of its adoption is to be found, no doubt, in the increase of personal property. A settlement of personal estate was not made with the object of founding a family or continuing the possession of family estates in the line of primogeniture. A strict settlement did not neglect the other members of the family, but it provided for them by jointures and portions charged on the land. The idea of a settlement of personal estate was different. It gave successive life interests to the husband and wife, and then, subject to powers of appointment among the issue of the marriage, gave the property to the adult children equally. The same trusts could readily be introduced into a settlement of land by means of a trust for sale, since, under the equitable doctrine of conversion, the land was at once turned into personalty. Further, whenever the ultimate object of a settlement was the division of land among children, there was a great advantage in effecting this by means of a trust for sale and for division of the proceeds. These were the two reasons for the use of the personalty settlement of land (see Davidson's "Conveyancing," 3rd ed., Vol. III, pp. 57, 857). The use of two deeds to effect this purpose was not, as we have seen, a new device in conveyancing. It was adopted in the personalty settlement in order to keep the trusts off the title and facilitate the sale of the land.

But, while the trust for sale came into general use in "traders' " settlements, there was a difficulty at first in getting settlors to allow an immediate trust for sale. They wanted the ordinary tenancy for life in the land so long as the life interests lasted, and the trust for sale was postponed until the proceeds required to be divided among the children, either under an appointment or in default of appointment. Conveyancers, however, pointed out (see Martin, *ubi supra*; Davidson, 3rd ed., *ubi supra*; Key & Elphinstone, 11th ed., II, 618) that an immediate trust for sale with a power to postpone, or a direction that the sale should only be made with the consent of the tenant for life, was for practical purposes equivalent to a deferred trust for sale, and an immediate trust for sale so qualified became the usual form. In this respect the practice of conveyancers is recognised by the Law of Property Act, 1925, and a trust for sale is immediate, although it is exercisable at the request or with the consent of any person, and although there is a power at discretion to postpone the sale (s. 205 (i) (xxix)).

The Evolution of the New Conveyancing.

The Property Acts of 1925 have for their ~~primary~~ object the facilitating of the transfer of land on sale, and, by reason of the

utility of the trust for sale for this purpose, it has become one of the leading features of the new system of conveyancing. The origin of this system is to be found in the Conveyancing Bill of 1898, which was drafted by the late Mr. E. P. Wolstenholme on the instructions of the Council of the Law Society. Its object, as stated in the prefatory memorandum, was "to make the title to land approximate as nearly as circumstances permit to the title to stock, and to obtain the same advantages as would be secured under as good a system of registration as may be devised, without the disadvantages incidental to a register of owners." The Bill is printed in the Appendix to Cherry & Marigold's *Land Transfer Acts*, 1875 and 1897. It incorporated a scheme for shortening abstracts, and abolishing, as legal estates, life and other limited estates, leaving them to take effect in equity by way of trust. These were to be protected by means of cautions and inhibitions to be lodged at the Land Registry, or, in the case of settled land, they were to be protected by the Settled Land Act trustees. As a general rule a caution or inhibition was not to be required when such trustees had been appointed. This scheme, in the preparation of which Mr. Wolstenholme was assisted by Sir Benjamin Cherry, the draftsman of the subsequent schemes of Lord Haldane and Lord Birkenhead, laid the foundation of the Conveyancing Law which is now in force. The fee simple and term of years absolute are the only legal estates; all other interests are equitable, and the system of cautions and inhibitions, which followed the analogy of the Land Transfer Acts, has been, in effect, adopted in the provisions of the Land Charges Act, 1925, for the registration of land charges, in particular of general equitable charges. The continuity of the successive schemes appears by a comparison of the specimen abstracts given in the First Schedule to Mr. Wolstenholme's Bill with the specimens given in the Sixth Schedule to the Law of Property Act, 1925. Mr. Wolstenholme felt that the only blot on the simplicity of his plan lay in the provisions dealing with settlements. "The Bill," he said, in the Prefatory Memorandum, "would be very short but for the necessity of providing for settlements." As unsettled land he felt no difficulty; there would be an estate owner with an absolute power of disposition, and the check on him was to be found in the cautions and inhibitions just mentioned. The special provisions as to settled land gave the fee simple to the tenant for life, but he was not to be able to convey unless the purchase money was paid to the Settled Land Act trustees or into Court. On his death his real representative—for that term was introduced for the devolution of land on death—would pass on the fee simple, by conveyance or assent, to the estate owner next entitled. The limitations of the settlement would be equitable and would be declared by a separate deed in the same manner as in the case of money arising from a trust for sale.

This reference to a trust for sale which occurs in Mr. Wolstenholme's Memorandum is significant, for we have here the origin of the present vesting deed and trust instrument; but when he had borrowed the device of two deeds from the settlement by way of trust for sale, his scheme had no further use for it. Sale by a trustee for sale does not appear as a separate mode of making title. The trustee is the estate owner and sells as such. Under the ordinary doctrine applying to trusts for sale, the sale would not be hindered by the existence of the beneficiaries, nor is it strictly correct that their interests are overreached by the exercise of the trust for sale, though the effect of the sale is usually so stated. Their interests exist in the proceeds of sale and in the rents and profits till sale, and they can only take an interest in the land itself by electing to put an end to the trust for sale, an election which requires that they shall be all *sui juris* and unanimous: see *Re Douglas & Powell's Contract* (1902, 2 Ch. 296, 312). Equitable interests paramount to the trust for sale—in other words, overriding interests—would be in the same position as if they affected the estate of an absolute owner; they would be liable to be overreached unless they were protected by a caution or inhibition registered at the Land Registry. Under Mr. Wolstenholme's scheme no special place was found for the trust for sale, and no statutory extension was to be given to it.

For the time Mr. Wolstenholme's scheme made no progress, but in 1913 it was taken up by Lord Haldane and formed the basis of his Conveyancing Bill; at the same time he introduced his Real Property Bill, which provided for the abolition of copyholds and proposed other changes in the Law of Real Property. The Bills were combined in the Real Property and Conveyancing Bill of the following year, but the outbreak of the war prevented its being passed. It was re-introduced in 1915, but it could not then be proceeded with, and the scheme was postponed till 1919, when Lord Birkenhead was Lord Chancellor. His own early interest in the subject was related by him in the House of Lords on June 12th, 1922, at the final stage of his Bill:—

“ It is exactly thirty-four years ago that a young man, addressing himself for the first time to the study of the Law of Real Property of this country, took out with him on a little walk to assist him in that purpose the work of the late Mr. Joshua Williams on Real Property. I was that young man and I conceived myself at that date as being far more intelligent than I do at this moment. I addressed myself to that study; I spent many hours upon that book on the first day, and I ended my day's labour with the Statute of Uses. On my way home, as I carried that book I surveyed that Statute of Uses from every conceivable point of view. I examined it in the concrete, I examined it in the abstract; and I came to the conclusion—I claim some merit for perspicuity in this matter—that it was the barbarous, if necessary, invention of a member of scholastic legal pedants, but that it had no contact

of any kind with our modern life, and I formed the resolution that if I ever attained any high place in the legal hierarchy, I would put an end to the Statute of Uses."

This early-formed intention, and Lord Birkenhead's driving force when he attained the appropriate place in the legal hierarchy, were, no doubt, the essential means of the passing of the Law of Property Act, 1922, which did, indeed, abolish the Statute of Uses, and also introduced in its place legal machinery of a different, and, it may be hoped, improved kind. But the practical origin of the revival of the scheme initiated by Mr. Wolstenholme was the publication of Sir Arthur Underhill's pamphlet the "Line of Least Resistance," and its adoption in the Fourth Report of the Acquisition of Land Committee, of which Sir Leslie Scott was chairman. It is printed as Appendix I to the Report (1919, Cmd. 424). It may be noticed that Lord Haldane's scheme, while professing to be founded on that of Mr. Wolstenholme, made a further rearrangement of interests in law. The only legal estates were to be the fee simple and terms of years, and these were called proprietary estates. Other interests were either paramount interests, such as tithe rentcharge, the rights of occupiers, and restrictive covenants of which a purchaser had notice; these could not be overreached by a conveyance by the proprietor; or subordinate interests, that is, interests taking effect by way of trust, and these could be overreached unless they were protected by cautions or inhibitions. The scheme was in the main Mr. Wolstenholme's with a new nomenclature, but it was on a much more ambitious scale. In addition to the abolition of copyhold tenure, it comprised many amendments of the Conveyancing Acts and Settled Land Acts which were adopted by Lord Birkenhead's Act and have been transferred to the Property Acts of 1925. Thus, in cases of compound settlements the trustees of the original settlement were to be the trustees of the compound settlement—see s. 31 of the Settled Land Act, 1925, amended by the Law of Property (Amendment) Act, 1926, so as to substitute the trustees of another instrument in the series forming the compound settlement where there are no trustees of the original instrument; words of limitation were not to be necessary in a disposition of the fee simple by deed; there was power for the Court to modify restrictive covenants; and mortgages were to be reconveyed by endorsed receipts (Law of Property Act, 1925, ss. 60 (1), 84, 115). And there was an advance in respect of trusts for sale. Thus, trustees for sale were to have the powers of a tenant for life; and so also were personal representatives. The former provision is now s. 28 (1) of the Law of Property Act, 1925, and the latter is s. 39 of the Administration of Estates Act, 1925. And Lord Haldane's Bill contained the very important provisions as to the effect of an assent in writing by a personal representative which are now

s. 36 of the latter Act. As to trusts for sale, it required that, on the appointment of new trustees, the same persons should be appointed trustees of the conveyance on trust for sale and of the settlement of the proceeds of sale. But there was no hint yet of the extended use of the trust for sale which was to be made by the Acts of 1925. The trust for sale had not yet come into its own.

The Curtain Provisions.

As observed above, the scheme of Mr. Wolstenholme's Bill, and of Lord Haldane's Bill which adopted it with modifications, was revived in 1919 by Sir Leslie Scott's Committee. The full title of the Committee was the Acquisition and Valuation of Land Committee, and its Fourth Report—the one referred to above—was on the Transfer of Land in England and Wales. The Report and its Appendices show how certain features of Lord Haldane's Bill came to be dropped and new features added. The chief new feature, as explained by Sir Benjamin Cherry in his Memorandum (printed as Appendix IV to the Report) on the draft Bill subsequently adopted by Lord Birkenhead, was that the Bill placed all interests in land, except legal estates in fee simple or for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement, and freed a purchaser in good faith from any obligation to look behind the curtain. "By this method, with the aid of the provisions relating to mortgages and the getting in of outstanding legal estates, the reforms sought in Lord Haldane's Bill of 1915 are, with insignificant exceptions, carried out without the complications incidental to that scheme; without inventing any new nomenclature; and without setting up a register of cautions and inhibitions." This was repeated in the Memorandum prefixed to the Bill when introduced in Parliament.

As regards these curtain provisions, Clause 3 of the Bill was so greatly modified before it became section 2 of the Law of Property Act, 1922, and that section was so altered again before it became s. 2 of the Law of Property Act, 1925, which section was again fundamentally altered by the Law of Property (Amendment) Act, 1926, that it would be useless to discuss the original form of the provisions in any detail. The "curtain" was to be supplied either by a trust for sale or a settlement, and the provision as to trusts for sale was as follows:—

"Cl. 3 (1)—Where at the commencement or by virtue of this Act land is subject, or is made subject, to a trust for sale, all estates, interests and charges in or over the same and subsisting at such commencement, which are or have by this Act been converted into equitable interests, shall attach to the proceeds of sale in like manner as if created by a trust affecting those proceeds."

Then sub-clause (2) turned all personal representatives in whom land (not being settled land) was vested into trustees for sale, and sub-clause (3) provided for all other cases of prior equitable interests by subjecting them to a settlement, if actually existing at the commencement of the Act, and otherwise to a settlement which was to be deemed to exist. Thus the curtain was provided (i) by a trust for sale, which was extended to the case of personal representatives, and (ii) by a settlement, actual or hypothetical. At the same time "trust for sale" was defined to mean, in relation to land, "an immediate binding trust for sale, with or without a power at discretion to postpone the sale." Thus Lord Birkenhead's Bill in its original form proposed to place behind the curtain, not only equitable interests arising under the trust for sale or under the settlement, but also equitable interests which were paramount to the trust for sale or the settlement. In other words, it proposed to turn every trust for sale into an overreaching trust for sale—a trust for sale binding every equitable interest in the land, whether paramount or subordinate to the trust for sale; and similarly as to settlements. This was resisted in the House of Lords as too drastic, and the Bill was consequently postponed.

When it was reintroduced in 1921 the clause had been materially altered, and after the further changes mentioned above, the Law of Property Act, 1925, provided in substance that a conveyance under a trust for sale should have such overreaching effect as was given by s.-s. (2), or as it would have independently of that sub-section. Now s.-s. (2) allowed the creation of an *ad hoc* trust for sale, of which more in a moment. Apart from that sub-section, a trust for sale had only its ordinary conveyancing effect; that is, a conveyance made under it would overreach the interests arising under the trust, but not interests paramount to it. It was possible, indeed, that, by virtue of an ingenious comparison of various sections of the Act, it would overreach paramount interests as well: see a lecture by Mr. A. F. Topham, K.C., 61 Law Journ. p. 183. This, however, was doubtful. For a trust for sale to have an overreaching effect under the Act of 1925, it was necessary that it should be a trust for sale created for this special purpose—a trust for sale *ad hoc*. Thus an absolute owner, whose estate was subject to an equitable charge to secure money advanced—if the charge was voluntary, the land, as mentioned later, was settled land, and so within the Settled Land Act—could convey the land to trustees for sale, and, provided the trustees were either two or more individuals appointed or approved by the court, or a trust corporation of established repute, a sale by them would overreach the equitable charge: see at end of Specimen Abstract, No. 2, in Schedule VI to the Act.

But this device was of restricted application; in particular, it did not enable trustees under an existing trust for sale to obtain over-

reaching powers, and the matter was placed on a fresh footing by the Law of Property (Amendment) Act, 1926, which varied s. 2 (2) of the Act of 1925 so as to make it read as follows :—

“(2)—Where the legal estate affected is subject to a trust for sale, if at the date of a conveyance made after the commencement of the Act under the trust for sale, or the powers conferred on the trustees for sale, the trustees (whether original or substituted) are either—

(a) two or more individuals approved or appointed by the Court or the successors in office of the individuals so approved or appointed; or

(b) a trust corporation,

any equitable interest or power having priority to the trust for sale shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land till sale.”

Consequently under the latest form of this curtain provision, a trust for sale overreaches paramount interests when, and only when, the trustees are qualified in the manner specified. Further, it does not matter how the trust for sale arises, and it may either be a trust for sale which has been created by settlement or by will in the ordinary way, or a trust for sale created by statute, or a trust for sale created by an absolute owner for the special purpose of overreaching the equitable interests—a trust for sale *ad hoc*. But by s.-s. (3) certain interests are excluded from this overreaching effort. For example, an equitable charge protected by a deposit of documents is not overreached, nor is a restrictive covenant. A charge protected by deposit of documents is specially favoured by the Acts, and the benefit of a restrictive covenant cannot be transferred to the purchase money. But a general equitable charge, as defined by the Land Charges Act, 1925, s. 10 (1), Class C, can be overreached even though registered as a land charge.

Statutory Trusts for Sale.

The trust for sale invented by conveyancers was a trust introduced for the convenience of the persons beneficially interested in the property. It had the incidental advantage that, when contained in a different instrument from the declaration of the trusts of the proceeds of sale—or even when contained in the same instrument—it facilitated the sale of the property; but, as has been pointed out, its primary objects were to enable the land to be settled upon trusts corresponding to those of a personalty settlement, and to secure that when the time for division came, it should be possible to turn the land into money and divide the money instead of partitioning the land. There is, under the new law, still a distinction between real settlements and personal settlements of land. A real settlement is now created by a vesting deed and a trust instrument, the latter declaring trusts of the land which correspond to

the old limitations of a strict settlement. A personal settlement of land is made, as formerly, by a conveyance on trust for sale, and then, in a separate instrument, by a declaration of the trusts of the proceeds of sale. The two instruments required under the new law for a real settlement are in fact copied from the established conveyancing form of a personal settlement of land. But, as regards the ultimate division of the land under a personal settlement among a number of children or other issue, the express trust for sale, while still convenient, is not essential; for, whenever land comes to be held in trust for persons entitled in undivided shares, a statutory trust for sale now arises (Settled Land Act, 1925, s. 36). In the case of land which was held in undivided shares on 1st January, 1926, a statutory trust for sale is imposed by the transitional provisions contained in Schedule I, Part IV, of the Law of Property Act, 1925. These provisions form a leading feature of that Act, and have been very extensively used since the Act came into operation. And while their application has occasionally been difficult, they have in general had a very beneficial effect in simplifying the title to land held in undivided shares. The expense of partition actions, or actions for sale in lieu of partition, was frequently out of all proportion to the value of the property. For such actions a trust for sale is substituted. Trustees for sale have, under the Law of Property Act, 1925, s. 27, power to effect a partition with the consent of the adult beneficiaries; but otherwise there must sooner or later be a sale—a trust for sale, whether express or statutory, carries a power to postpone the sale—and, save under exceptional circumstances, no application to the Court can now be necessary; and when necessary it will be of a simple character, such as an application for the appointment of trustees of the entirety of the land.

That is one of the two statutory extensions of the trust for sale. The other is the statutory trust for sale which arises under s. 33 of the Administration of Estates Act, 1925, in cases of intestacy as to real estate. It is a consequence of the abolition of the heir at law for ordinary purposes of descent. "All existing modes, rules, and canons of descent" are abolished (*ibid.*, s. 45 (1)). The heir is still recognised in equitable limitations of real or personal property (Law of Property Act, 1925, s. 132), but heirship as a general title to real property is extinct for cases where the ancestor has died since 1925. Instead of this there is a statutory trust for sale, and the proceeds of sale of the real estate, and of the sale and conversion of the personal estate, form a mixed fund out of which debts and the expenses of administration are paid. The balance goes to the next of kin of the deceased according to the new Rules of Distribution (Administration of Estates Act, 1925, ss. 46, 47). It would be too much to say that the equitable doctrine of conversion is gone, for an imperative trust for the

sale or purchase of land (see *Re Walker, Mackintosh-Walker v. Walker*, 1908, 2 Ch. 705), will still convert real estate into personalty, and *vice versa*, and the change may have legal results—for instance, as regards estate duty, which, in the case of real estate falls on that estate, but in the case of personal estate is paid out of residue. But a total or partial failure of the purposes of conversion can no longer raise questions as between the heir at law and next of kin of the testator who directed the conversion, or as between the heir at law and next of kin in the succeeding generation; and such cases as *Smithson v. Ackroyd* (1780, 1 Bro. C.C. 503, referred to above: heir at law taking on partial failure of the purpose of conversion), or *Smith v. Claxton* (1820, 4 Madd. 484: next of kin of deceased heir of law taking on similar failure), cannot arise where death has taken place since 1925. The disappearance of the distinction in cases of intestacy between the devolution of real and personal estate makes this branch of equity, and the decisions on which it was founded, obsolete.

Title on Sale.

But while the express trust for sale of land is no longer essential in order to provide for the distribution of the property, since the law steps in and, if necessary, creates a trust for sale whenever land is to be divided between several persons; nor is it effective to change the course of devolution upon intestacy; yet, as a form of settlement, and as a means of making title on sale, it has lost none of its former importance; rather, it has gained. Primarily, as has been observed above, the object of the Property Acts of 1925 is to facilitate the transfer of land, and for that purpose the legal estate has been confined to the fee simple in freehold land and a term of years absolute in leasehold land. The simplest case is where the estate owner is also beneficially entitled free from equities: Putting this aside, the land may be settled land, it may be held on trust for sale, it may be held by personal representatives, it may be subject to a mortgage, or it may be in the hands of an absolute owner subject to some equitable interest. Legal mortgages can now only be made by demise for a term of years, or by a legal charge which has results corresponding to such a demise. The Law of Property Act, 1925, contains full power for the mortgagee to realise his security and vest the mortgagor's freehold or leasehold estate in a purchaser. That has nothing to do with the trust for sale, and need not be further considered. In the case of an absolute owner subject to an equitable interest, a distinction has to be made according as the equitable interest is a voluntary or family charge or not. If it is a voluntary or family charge, the land is settled land within Settled Land Act, 1925, s. 1 (i) (v), and, apart from the relaxation introduced by s. 1 (i) of the Law of Property (Amendment) Act, 1926, title on a

sale has to be made under the Settled Land Act. If the equitable interest is not of this kind; if, for instance, it is a charge for money advanced; then, as pointed out above, the estate owner can create a trust for sale for the purpose of overreaching it. Or he can declare the land to be settled land and make a title under the statutory powers of a tenant for life (Settled Land Act, 1925, s. 21). In other words, he can create a trust for sale or a settlement *ad hoc*. But both these methods may be troublesome; they necessitate the appointment of a trust corporation as trustee, or the trustees must be either appointed or approved by the Court, and the purchase money must be paid to the trustees. These devices are only suitable for use where the owner of the equitable charge cannot be found. In ordinary cases they are avoided by procuring a release of the charge or the concurrence of the owner of the charge in the conveyance to the purchaser. Such concurrence may be opposed to the principle of the Law of Property Acts that equitable interests must be kept off the title (see Law of Property Act, 1925, s. 42). But it is not forbidden and it is too convenient to be abandoned.

This leaves the three forms of making title which are of chief conveyancing importance: sales under the Settled Land Act, sales under trusts for sale, and sales by personal representatives. They are mentioned together here because for certain purposes they are grouped together in the Property Acts. Thus in the Settled Land Act, 1925, we find that extensive powers relating to the management of land are conferred on the tenant for life: powers of leasing and of developing the land (s.s. 41, *et seq.*). These are taken with extensions from the former Settled Land Acts. Where land is settled by way of trust for sale, it has hitherto been the practice to insert in the conveyance on trust for sale such powers of management as are likely to be required. But, inasmuch as settlements under the Settled Land Act and settlements by way of trust for sale are really alternative modes of settling land, it has been considered proper to give the same powers of management in each case. Accordingly this is done, not by expressly repeating the powers in the case of trustees for sale, but by providing (Law of Property Act, 1925, s. 28) that trustees for sale shall in relation to land have all the powers of a tenant for life. A further step is taken when we come to personal representatives. These, also, may hold possession of land for a considerable time after the death of the testator or the intestate, and during this possession they may require to have an owner's powers in respect of the management of land. As regards the sale or other disposition of the land they have at common law all the necessary powers over leaseholds, and these were extended to real estate by Part I of the Land Transfer Act, 1897, an extension which is now contained in Part I of the Administration of

Estates Act, 1925. How complete those powers are was shown by the decisions of the Court of Appeal in *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract* (1922, 2 Ch. 824), where it was held that, in a district where this was a usual way of dealing with land, executors could sell the surface and minerals separately, and soon afterwards, in *Re Kemnal & Still's Contract* (1923, 1 Ch. 293), where it was held that executors entitled to an undivided share in land could concur in a partition with a view to the realisation of the estate. Perhaps on the analogy of these decisions the Courts would have recognised that executors have all the necessary powers for the management of their testator's land, but any uncertainty on this point is removed by s. 39 of the Administration of Estates Act, 1925, which gives to personal representatives all the powers conferred by statute on trustees for sale. Partly, these powers are conferred directly on trustees, such as the power of partitioning land among the beneficiaries conferred by s. 28 (3) of the Law of Property Act, 1925. Partly, as stated above, they are powers conferred by reference to the statutory powers of a tenant for life, as in s.-s. (1) of the same section. It follows that all these powers are exercisable also by personal representatives. Indeed, administrators do not require powers to be thus conferred on them by reference to trustees for sale, for an administrator, as already noticed, is himself a trustee for sale of the real estate of the intestate (Administration of Estates Act, 1925, s. 33), and, therefore, he has in this character the powers of such trustees (see also Law of Property Act, 1925, s. 33). But to know what an executor can do, it is necessary to inquire what a trustee for sale can do, and then it may be necessary to go a step further and inquire what a tenant for life can do. The hunt from one part of the Property Acts to another may seem embarrassing, but they have to be taken as related statutes.

"All are but parts of one stupendous whole."

And, when it is realised that the construction of the Acts requires what has been called a "non-stop" run through them, the difficulty is not very serious. The principle is that tenant for life, trustees for sale, and personal representatives are all for the time being in the position of owners of land. All are "estate owners," and all are allowed the powers required to make that ownership effective.

The power of executors to make a title is, of course, a permanent item in conveyancing practice. As between title under trusts for sale and title under the Settled Land Act, it may be anticipated that the superior convenience of trusts for sale will in time give them the prevalence over real settlements, and then the trust for sale will finally have come into its own. A restrictive construction has, indeed, been judicially put upon the term, and it has been held that in the Law of Property Act "trust for sale," which is defined to mean "an immediate binding

trust for sale" (s. 205 (i) (xxix)), means, unless this is excluded by the context, a trust which binds all the interests in the land the subject of the settlement (*Re Leigh's Settled Estates*, 1926, Ch. 852). It seems, however, that the term used to denote a trust for sale of this kind—that is, an overreaching trust for sale—is "effectual trust for sale" (Administration of Estates Act, 1925, s. 39 (1)); and an ordinary trust for sale becomes an overreaching trust for sale when the trustees are qualified under s. 2 (2) of the Law of Property Act, 1925, as mentioned above. In fact the word "binding" was introduced into the definition of "trust for sale" for a different purpose; namely, to exclude a trust for sale like that in *Re Goodall's Settlement* (1909, 1 Ch. 440), which might never arise. The matter is of importance with regard to the distinction between settled land and land held on trust for sale which is made by the additions to ss. 1, 3, of the Settled Land Act introduced by the Amendment Act of 1926. The object of these additions was to make it clear that trusts for sale were to be distinguished from real settlements, and were not to be brought within the Settled Land Act. Under the former law this was different, and s. 63 of the Settled Land Act, 1882, placed them on the footing of settled land. This section has been repealed, and the additions made by the Amendment Act of 1926 emphasise the repeal. But this is of temporary importance. Ultimately, no doubt, the restriction imposed on trusts for sale by *Re Leigh's Settled Estates* will be removed, and the trust for sale will have the meaning which the framework of the Property Act requires; namely, an immediate trust for sale, which, though it may be postponed, cannot be got rid of save with the consent of all the beneficiaries.

Since the above was written it has been held on a further hearing of *Re Leigh's Settled Estates*, and also in *Re Lindsley's Estate*, heard at the same time, that the above judicial interpretation of a binding trust for sale is not affected by the Amendment Act of 1926, though, so soon as trustees have been appointed or approved by the Court, the trust for sale becomes binding, and if the land was settled land it ceases to be so. But this interpretation of trust for sale, if applied generally in the Property Acts, would so upset their scheme that probably it will not be permanent.

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NOTES ON RECENT CASES.

CONTRACT—SALE OF GOODS—DELIVERY BY INSTALMENTS—PRICE OF
EACH INSTALMENT TO BE PAID SEPARATELY.

Howell v. Evans. 42 T.L.R. 310.

The point in this case, though small in itself, is one of those which were not settled in the Sale of Goods Act, 1893, and which until decided in court, leave *lacunae* in the code of law relating to that contract.

The defendant ordered from the plaintiffs, a firm of publishers of engravings, a set of thirteen engravings, entitled "Cries of London," to be sent to him "as published, the price of each plate to be 10 guineas." The first four plates were delivered, but the defendant refused to pay until delivery of the complete set, and returned the plates he had received.

In an action for the price of the four plates in the Cardiff County Court, the judge, relying on *Oxendale v. Wetherell* (9. B. & C. 285), held that the contract was indivisible and found for the defendant.

On appeal, the Divisional Court—Scrutton and Sargant L.JJ.—reversed the judgment and held that as the contract was an instalment contract and the instalments were to be paid for separately the plaintiffs were entitled to recover.

It is difficult to see how *Oxendale v. Wetherell* came to be confused with this case at all. The learned County Court judge seems to have based his decision on an *obiter dictum* irrelevant to the issue. In *Oxendale v. Wetherell* there was a contract to deliver 250 bushels of wheat in a given time. 130 bushels were delivered and kept by the purchaser after the expiry of that time. It was held that the vendor might after the expiry of the contract time recover the value of the goods had and retained, but Parke B. further declared that he believed that such an action brought before the expiry of the contract time would fail, because in the event of failure to deliver the rest of the goods, the purchaser has the right to return the part delivered.

The case of *Manor v. Pyne* (3 Bing. 356) is much more comparable with the present case and in fact seems completely to cover it. The contract in *Manor v. Pyne* was for a work, published by subscription in 24 numbers at a guinea a number. The defendant received 8 numbers but was in default in accepting the rest. Best L.C.J. held that the price of the numbers actually received could be recovered. "The meaning of the contracting parties when they say 24 numbers at a guinea each number is that the publisher shall be paid as the numbers come out; not that he is to wait until the work is complete before he receives any money."

General principles of law and the demands of modern commerce necessitate a rule similar to that enunciated in the Divisional Court—a rule which is founded on sound precedent and gives equitable satisfaction.

R. A. W.

TORT—LIABILITY FOR ANIMALS—TRESPASS—SCIENTER.

Buckle v. Holmes [1926] 2 K.B. 125.

In *Buckle v. Holmes* the plaintiff was a pigeon-fancier. The defendant's cat killed some of the birds, and the plaintiff sought to make the defendant liable for the damage. There was no evidence of any vice in the cat other than the habit common to all cats of straying and killing birds. The County Court judge gave judgment for the defendant and this was upheld on appeal both in the Divisional Court and in the Court of Appeal.

The law governing the liability of owners for the mischievous acts of their animals presents a complex first-appearance, inasmuch as liability may exist under so many different heads of tort. The ingredients of liability differ considerably in these different torts, and there are several cases reported showing how a plaintiff could lose his case through

choosing a wrong head of tort under which to sue and thereby incurring a heavier burden of proof than would have been necessary under some other head that was open to him. In these days of greater liberty of amending pleadings this danger is largely averted. But that the distinctions still exist is well shown in *Manton v. Brocklebank* [1923] 2 K.B. 212—where the plaintiff, not being in possession of the land on which the damage was done, could not succeed in trespass and had to sue in case and thereby incur the burden of proving *scienter*. Since no *scienter* was proved the plaintiff could recover nothing from the defendant.

That the proof of *scienter* is necessary to establish liability *only* under the *Rule in May v. Burdett* is a truth apt to be clouded by the fact that in almost all cases dealing with animals the judges are found discussing the nature of the animals. The distinction is this:—

- (a) In actions on the case (*i.e.*, under the *scienter* rule) the nature of the animal which committed the mischief and the knowledge of the owner of its mischievous nature are discussed in order to *establish* liability at all.
- (b) In other cases the nature of the animal and the knowledge of its owner of its mischievous tendencies are not discussed to establish liability but to determine the extent of the damages for which he is to be held liable, *i.e.*, to answer the question whether the damages are too remote or not. Thus Atkin L.J. in the principal case said, “Where the owner is liable for the animal’s trespasses it may be material to consider whether the damage it does is the result of a normal propensity. For this damage the owner is liable: but for damage resulting from an abnormal propensity not known to him he is not, in my opinion, liable, though he would of course be liable for the ordinary consequences of the trespass.” Lush J. in *Heath’s case* [1916] 2 K.B. 206, remarked: “In dealing with cases of damage caused by animals *mansuetae naturae* one must consider what an animal of that particular kind may naturally be expected to do if it strays and whether the accident was likely to occur.” In cases of negligence the rule is now different, we presume, after the *Polemis case* [1921] 3 K.B. 560, for, seemingly, knowledge of the animal’s nature or the likelihood of the damage occurring will be relevant in considering the question whether the defendant was negligent or not, but not in the determination of the limits of the liability of the owner once the negligence is established.

Where in the constellation of cases shall we fix this case of *Buckle v. Holmes*? It is a case of trespass and is clearly dealt with as such by Bankes and Atkin L.JJ. Counsel for the plaintiff started his argument by dealing with the case as one of trespass, but shifted his ground, to attempt to establish liability under the *scienter* rule, by distinguishing the case from *Manton v. Brocklebank*, a *case action*. Thus he attributed *scienter* to the defendant by arguing that it is common know-

ledge that cats will kill birds and contended that therefore no proof of *scienter* in the defendant need be proved. In short, he attempted to put cats in the class of animals regarded for the purposes of the *scienter* rule to be *ferae naturae*, of whose mischievous nature the owner is conclusively presumed to have knowledge. Bankes L.J. drew the attention of the Court to the test for the classification of animals as *ferae naturae*, admitted by the plaintiff's counsel to be *danger to mankind*. Clearly, therefore, a cat could not be put in that category since cats, in general, are harmless to mankind. To bring the case under the *scienter* rule the appellant would have to prove some specially mischievous tendency in the cat over and above the natural propensities of cats generally. In any case, as the action was in trespass, the *scienter* of the defendant was irrelevant.

To the rule that the owner is strictly liable for the trespass of his animals there is an old exception, viz., the trespasses of dogs, an exception usually based on Lord Holt's judgment in *Mason v. Keeling* (1700) 1 Ld. Raymond, 606. *Buckle v. Holmes* decides, for the first time, that a cat is also in this privileged position.

D. R. S. D.

CONTRACT—SALE OF GOODS—UNCUT TIMBER—SPECIFIC GOODS—
FRUSTRATION OF CONTRACT—ILLEGALITY—SALE OF GOODS ACT,
ss. 17, 18, 62.

Kursell v. Timber Operators and Contractors, Ltd. [1927] 1 K.B. 298.

On September 10th, 1920, the appellant agreed to sell all "merchantable timber growing on August 20th, 1920" in a certain forest in Latvia. "Merchantable timber" was defined as "all trunks and branches of trees, but not seedlings and young trees of less than six inches in diameter at a height of four feet from the ground." The purchasers were to have 15 years in which to cut the timber, but if prevented by an act of the government or by force majeure the period was to be extended. On September 16th, 1920, the Latvian Assembly passed a law by which the forest became the property of the Latvian State. This law was still in force at the date of the hearing.

The case turned on the question whether the property in the timber had passed when the contract was made. Property can only pass at the date of the contract (1) if the goods are specific or ascertained and the parties so intend (Sale of Goods Act, s. 17 (1)); (2) if there is an unconditional sale of specific goods in a deliverable state, and no different intention appears (s. 18, r. 1). Neither of these conditions was fulfilled. The goods were not ascertained at the date of the contract because "ten years hence it may be very difficult to decide whether a tree had been of not less than six inches in diameter on August 20th, 1920;" nor would it be possible to tell at what height a measurement should be

taken. Nor were the goods specific, because according to the definition of that word in s. 62 it "means goods identified and agreed upon at the time a contract of sale is made," and the timber was neither identified nor agreed upon. It may have been identifiable, but that is not enough; goods must be actually identified at the time. Nor, again, were the goods in a deliverable state: trees are not in a deliverable state till they are severed, following Lord Johnston's opinion in *Morison v. Lockhart* [1912] S.C. 1017. Finally, not only was there no intention to be gathered that the property was to pass at the date of the contract, but Lord Hanworth was prepared to find a contrary intention from the circumstances.

The purchasers also contended that the contract had been frustrated, but this point was not decided by the court. Scrutton L.J., however, said that so much remained to be done under the contract that he thought the doctrine of frustration would probably apply, in spite of the clause making provision for any government act (following *Metropolitan Water Board v. Dick Kerr and Co.* [1918] A.C. 119). He also said that the contract had become illegal as being "at present permanently illegal in the place where the greater part of the contract is to be performed." (cf. *Ralli Bros v. Compañia Naviera Sota y Aznar* [1920] 2 K.B. 287).

A. P. L.

CONTRACT—WAGERS—NEW CONSIDERATION.

Burrel and Son v. Levin (42 T.L.R. 407); *Richardson v. Moncrieff* (43 T.L.R. 32); *Hyde v. Tyler* (42 T.L.R. 442 and 652).

According to 5 & 6 William IV, c. 41, and 8 & 9 Victoria, c. 109, a gaming debt is not enforceable at law. But it was held in the case of *Whiteman v. Newey* (28 T.L.R. 240) that where there was a new promise founded upon a new consideration, it would be sufficient to prevent the operation of the Gaming Acts. Similarly in *Wilson v. Conolly* (27 T.L.R. 212) a promise to forbear from suing on a sum due on a betting account was held to be sufficient consideration to support an agreement which thus took the transaction outside the Gaming Acts.

These cases were followed in *Hyams v. Stuart King* [1908] 2 K.B. 696, where the consideration for the new agreement was a forbearance to report the defendant as a defaulter to Tattersall's. The present tendency is to restrict the scope of this case, which itself was an extension of the principle.

In the case of *Burrel and Son v. Levin*, the defendant owed the plaintiff's not suing, the defendant agreed to pay by instalments. The plaintiff's not suing, the defendant agreed to pay by instalments. Owing to financial difficulties he was unable to continue payment and the plaintiff brought an action to recover the balance. The plaintiff argued that it was not merely a case of giving the defendant time to pay

but a compromise of pending actions. Defendant argued that a compromise of pending actions would be valuable consideration only if there was a *bona fide* cause of action, which was clearly not the case with an action for the recovery of a gambling debt. Judgment was given for the defendant on these grounds.

In the case of *Richardson v. Moncrieff*, the plaintiff claimed a sum of money on a dishonoured cheque given by the defendant in payment of gambling debts. He claimed that there was a breach of contract to pay into the bank sufficient money to meet the cheque in consideration of the plaintiff's postponing presentation. The evidence showed that when the defendant handed the cheque to the plaintiff he asked him to hold it over and the plaintiff agreed to do so. A few days later it was agreed that the cheque should not be presented until a certain day. Held: there was no evidence to go to the jury to prove a new bargain.

In *Hyde v. Tyler* the plaintiff had backed a horse in a race and a dispute followed as to the odds at which the bet was payable. In the correspondence which ensued the defendant wrote that the only means of settling the dispute would be to place the matter before Tattersall's Committee "by whose decision I shall be willing to abide." The committee decided in favour of the plaintiff, who brought an action to recover the debt, alleging that the defendant was bound by the decision of Tattersall's committee. The action failed, because there was no agreement to pay the money founded upon a valuable consideration. The judge held that the words "by whose decision I shall be willing to abide" did not constitute an agreement to pay. There was therefore no agreement which took the transaction outside the Gaming Acts. The appeal was dismissed.

H. E. D.
W. E. W.

INTERNATIONAL LAW—IMMUNITY OF FOREIGN STATE FROM LOCAL JURISDICTION.

The Jupiter (No. 1). [1924] P. 236.

The Jupiter (No. 2). [1925] P. 69.

The Jupiter (No. 3). [1927] 43 T.L.R. 210.

The series of actions under consideration extends from 1924 to 1927. The facts involved were somewhat complicated, and from the nature of the circumstances difficult of ascertainment. They may, however, be roughly summarised as follows.

The original plaintiffs were a foreign company, the head offices of which were at Petrograd; but in 1919 they removed to Marseilles, and, by virtue of decrees issued by the French Courts, administrators were appointed to take charge of the company's property. Freights having

become unprofitable, one of the company's ships—"The Jupiter"—was laid up at Portsmouth under a master appointed and employed by the administrators. In 1924 the master handed over the ship to the agents of the Russian Soviet Government. The plaintiffs thereupon commenced proceedings in rem against the ship and all persons interested therein. The Russian Soviet Government immediately protested, and claimed to have the writ set aside on the ground that the ship had become its property under a nationalisation decree, and that consequently the action ought not to proceed, because that would be to compel a foreign State to submit to the jurisdiction of the Court against its will. The learned judge agreed, and his judgment was upheld by the Court of Appeal in *The Jupiter* (No. 1).

Scrutton L.J. states the position thus: "It is agreed that the Union has been recognised *de jure* and *de facto* by the British Government. It appears to me without going any further, without investigating whether the claim is good or bad, that the Court, on having that statement made to it, must decline jurisdiction."

After this decision the Russian Soviet Government purported to sell the ship to an Italian company—the defendants in the subsequent proceedings. Thereupon the plaintiffs again instituted proceedings for the recovery of the vessel. The defendants moved to have the writ set aside, because the plaintiffs sought to impugn a title acquired by them (the defendants) from the Russian Government, and thereby indirectly to implead a foreign State without its consent. The President, however, rejected this contention, and he was upheld on appeal in *The Jupiter* (No. 2).

The action in rem, therefore, proceeded before Hill J.—*The Jupiter* (No. 3). The learned judge held that the handing over of the ship by the master was *prima facie* unlawful, and that *prima facie* the plaintiffs were entitled to possession. To disprove this it was necessary for the defendants to show a superior title derived through the Russian Government. Consequently they produced an affidavit by the Russian Chargé d'Affaires stating that the property in the ship had become vested in the Russian Government, and that it had been sold by them to the defendants, and they claimed that this declaration made on behalf of the Russian Government was conclusive. The contention was emphatically rejected. "What authority is there," asks the learned judge, "for the proposition that the declaration of a foreign sovereign is conclusive evidence that personal property in this country is, or was, the property of the foreign sovereign? I believe that proposition holds good only in the case where the jurisdiction of the Court . . . is sought to be enforced against property and in such case is limited to the declaration that the property is the property of the foreign sovereign. It is involved in the principle that a foreign sovereign and his property are immune from the jurisdiction of the Court unless the foreign sovereign chooses to submit to it."

Any other conclusion would lead to a curious result, for, if the foreign government chose to submit to the Court's jurisdiction in an action where

the question was whether the property was in that government or not, the Court would then be bound to accept as conclusive the declaration of that government that it was. This would be attributing greater force to the declaration of a foreign government than would be given to a similar declaration made on behalf of the King. It follows *a fortiori*, therefore, that a declaration by a foreign state that the property had been in itself is not conclusive in deciding a question of private property.

The defendants relied upon the case of *A. M. Luther v. James Sagor and Company*, [1921] 3 K.B.D. 532, where the plaintiffs sought to recover property which had been confiscated by the Russian Government and which that government had sold to the defendants. The following passage from the judgment of Scrutton L.J., at pp. 555-6, was cited: "What the Court cannot do directly it cannot, in my view, do indirectly. If it could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from the government by denying that the government could confer any good title to the property. The immunity follows from recognition as a foreign State."

Hill J., however, held that that decision was not in point, for there the goods in question were admittedly within the territory of the Russian Soviet Government, and its decree admittedly had the effect of nationalising them. The only question there was whether the Courts should refuse to recognise the decree and the titles conferred under it as being confiscatory and unjust. The decision is merely an application of the principle that the Courts of one country will not sit in judgment over the acts of another done within its own territory.

In the present case, on the other hand, the learned judge held that "The Jupiter" never was within the territory of the Soviet Government, and consequently it had not been transferred to that government under its decrees. Therefore the defendants had failed to disprove the *prima facie* right of the plaintiffs to the possession of the ship.

The three decisions may, perhaps, be conveniently summarised in the form of these propositions:—

- (1) The Courts will not entertain an action, if, to do so, would be to implead a sovereign independent state without its consent.—*The Jupiter* (No. 1).
- (2) A foreign government is not impleaded merely because the title of one of the parties to an action depends on the validity of the previous title of that government.—*The Jupiter* (No. 2).
- (3) The declaration of a foreign government that the ownership of property was, or is, in itself will not be accepted as conclusive except where the declaration is made for the purpose of securing its immunity from jurisdiction.—*The Jupiter* (No. 3).

D. J. LL.D.

MONEY PAID UNDER A MISTAKE OF FACT—RECOVERY—FRAUD—ESTOPPEL.

R. E. Jones, Ltd. v. Waring and Gillow, Ltd. [1926] A.C. 670.

Substantially the problem in this case was as follows. A, who mistakenly believed that he was indebted to B, sent him a cheque. B. accepted the cheque, mistakenly believing that it was in payment of a debt owed to him by C, and in consequence B restored to C certain goods which he had seized in payment of a former debt. On discovering his mistake, could A recover the money paid to B?

The broad principle as to recovery of money paid under a mistake of fact was laid down in 1841 in the case of *Kelly v. Solari*, 9 M. & W. 54. There an insurance company paid money upon a policy which had in fact lapsed, and it was allowed to recover it although it had not availed itself of all the means of knowledge open to it. Parke B said "Where money is paid under a mistake, that is upon the supposition that a specific fact is true, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it."

This being the general principle, are there any qualifications of it? It was suggested that where the payee had acted to his detriment (as by transferring the money or its value to a third person, without receiving a corresponding benefit) the payer could not recover. With this suggestion a minority of the House of Lords agreed, relying upon the following cases: *Kleinwort v. Dunlop Rubber Co.*, 97 L.T. 263, *Continental Caoutchouc Co. v. Kleinwort*, 9 Com. Cas. 240, *Deutsche Bank v. Beriro*, 73 L.T. 669, and *Kerrison v. Glyn Mills, etc.*, 17 Com. Cas. 41, 54.

In *Dunlop's* case the House of Lords laid emphasis on the principle that where the payee, an agent, had acted to his detriment, the payer was estopped from recovering money paid by mistake.

In the second case an agent who had received money under a mistake was made to restore it on the ground that he had not acted to his detriment, and hence there was no injustice in compelling him to pay it back.

Similarly in the *Deutsche Bank* and *Kerrison* cases the money was paid to agents and the facts were the same as were envisaged in *Loreburn L.C.'s* judgment in the *Dunlop* case.

Of course, if the payee does nothing more than expend the money on his own purposes this is no true defence, for there is no appreciable detriment. This was held in *Standish v. Ross*, 1849 3 Ex. 527 and *Bayliss v. Bishop of London*, 6 Q.B.D. 234.

On examination, then, the above four cases are all distinguishable on the ground of relation. The estoppel goes no further than to provide a defence for an agent who has acted to his own detriment on the faith of a statement made by his principal. As between principals there can on these grounds be no estoppel.

In the present case, therefore, the majority of the House saw no qualification of *Kelly v. Solar*.

Lord Sumner's position can be summarised as follows. If a tradesman misdelivers goods so that the wrong person get them, they do not thereby become the property of the receiver, for passing of property is a question of intention. When goods are found, the maxim that finding is keeping attracts many people, but not without a strong subconsciousness of guilt. In the case of payments of money, however, the notion is common that if someone pays me money when he need not do so it is my windfall, for I am not bound to keep his accounts for him. This is where the fallacy comes in. I may not be bound to know the payer's accounts, but I ought to know my own. So here, respondents must be taken to have known that appellants were not their debtors. If so, and without more, there was no intention of making the money theirs in any event. They cashed the cheque at their own peril.

A further point raised was whether the case of *Watson v. Russell*, 3 B. & S. 34, applied. There K had a mandate from R to deliver a cheque to W only upon a certain condition. He delivered the cheque, but omitted to mention the condition, and thus was an agent with a secret limitation of his ostensible authority. Clearly this case was not in point, for there was no question of mistake of fact at all and the decision was upon grounds of excess of authority only.

F. D. L. McI.

NEGOTIABLE INSTRUMENTS—CHEQUE—"HOLDER IN DUE COURSE"—BILLS OF EXCHANGE ACT, 1882, SS. 2; 21, SUB-S. 2; 29, SUB-S. 1; 31.

R. E. Jones, Ltd. v. Waring and Gillow, Ltd. (Continued).

This case raises the interesting question whether the original payee of a bill payable to order can be a "Holder in Due Course"; incidentally it discovers an inconsistency in that generally reliable piece of legislation, the *Bills of Exchange Act*, 1882. The respondents in this case acted in good faith, and unless the fact of their being the original payees of the cheque prevented them, they would be holders thereof in due course, and as such entitled to retain the proceeds of the cheque, a valid delivery being conclusively presumed in their favour (B. of E. Act, s. 21, sub-s. 2).

What previous authority there existed on the point consisted only of two opposing dicta. Fletcher Moulton L.J. in *Lloyd's Bank v. Cooke* [1907] 1 K.B. 794, argued that the original payee could be a holder in due course, and his view has been followed in most text books; while Lord Russell of Killowen in *Lewis v. Clay*, 67 L.J.Q.B. 224, held the opposite view, which was that taken by the House of Lords in the present case.

Now each of these opposing conclusions can be reached by equally logical deductions from the Bills of Exchange Act; it is the mutual inconsistency of certain definitions in the Act which causes the plausibility of both views.

Assuming, from s. 29, sub-s. 1, that a Holder in Due Course must have had the bill *negotiated* to him, the supporters of each argument seek a definition of "negotiation." Those in favour of the original payee being a holder in due course quote s. 31 sub-s. 1, which states that "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill;" since a holder is defined in s. 2 as including the "payee" of the bill, transfer to a payee must be negotiation; therefore s. 29, sub-s. 1 is satisfied, and the payee is a holder in due course. The opposing side seeks justification in s. 31, sub-s. 3, which provides that "a bill payable to order is negotiated by the indorsement of the holder completed by delivery;" a conclusive argument that the original payee of such bill, through lack of indorsement to him, cannot be a holder in due course.

From this it is clear that sub-sections 1 and 3 of s. 31 are mutually inconsistent, leading to results diametrically opposed, and that a choice must be made between them.

It is maintainable that sub-section 3, inasmuch as it clearly presents the only method of negotiating a bill payable to order, should be followed in questions arising on such bills, and that, as sub-section 2 deals with the negotiation of bearer bills, sub-section 1 is in any case superfluous. But the argument is two-sided, for sub-section 3 would itself be equally superfluous, were sub-section 1 accepted as the definition of negotiation, since the indorsement of an order bill by the holder is rendered equally necessary by sub-section 4, and the delivery by s. 21 of the Act.

But if sub-section 3 be construed as applying only to negotiation by a holder, as though the words read—"a bill payable to order is negotiable by the *holder* by his indorsement completed by delivery," this construction would not prevent the transfer to the original payee (whose transferor was *not* a holder), from being a negotiation within sub-section 1; the original payee would become in consequence a holder in due course, and sub-sections 1 and 3 would be reconciled.

If this construction is not permissible, then the grammatical interpretation of the word "negotiated" in s. 29 must lead to inconsistency, and the "logical" interpretation should be applied, which seeks the true intent of the legislator. Clearly the intent of the framers of the Act was to leave the law as it was before the Act, when an original payee of a bill, whether to order or bearer, could be a holder in due course. If the framers of the Act had intended to change the law in respect of order bills, they would have laid down a definite provision to the effect, instead of requiring their intent to be inferred from reference from one section to another. The language of s. 29 sub-s. 1 itself is far from convincing that "negotiation" was intended to be made in any technical sense at all to a holder in due course; the word "negotiated"

in that section gives rather the impression of being used in a loose sense, as meaning merely "transferred," occupying as it does an unimportant position in the sentence in which it occurs.

The majority of the House of Lords, however, ignoring the undoubted combined effect of s. 31, sub-s. 1, with s. 2, construed the word "negotiated" in s. 29 strictly in accordance with s. 31, sub-s. 3, thus reaching the inevitable but unsatisfactory conclusion that the payee of a bill payable to order cannot be a holder in due course.

R. W.

NEGOTIABLE INSTRUMENTS—GIFT INTER VIVOS—CHEQUE NOT PAID IN
DONOR'S LIFETIME—NATURE OF CHEQUE—INCOMPLETE GIFT.

In re Swinburne. Sutton v. Featherley. [1926] 1 Ch. 38.

A drew a cheque voluntarily for £700 in favour of the plaintiff, who presented it at A's bank. The bank refused immediate payment because they doubted the genuineness of A's signature. Before another cheque could be drawn or presented, A died. The plaintiff sued A's executors for £700. She could not, of course, sue the defendants on the cheque, since no consideration had been given; but she claimed £700 as her own property, on the ground that a valid gift of it had been made by the delivery of the cheque.

This contention misrepresents the fundamental nature of a cheque. Sections 73 and 3 (1) of the Bills of Exchange Act, 1882, show that a cheque is an order by the drawer to his bank to pay the payee or holder. A cheque is an instrument giving the holder mere authority to receive payment, and imposing upon the bank an authority and a duty, arising from an implied contract between the bank and the drawer, to meet the cheque on presentation provided it does not exceed in amount the bank's debt to the drawer. The bank's authority from and duty towards the drawer to meet his cheques is determined by notice of the death of the drawer (s. 75 (2)), at which moment, therefore, it will no longer be obliged or even allowed to pay the holder of the drawer's cheque; thus, in effect, the authority of the holder to receive payment ceases with the death of the drawer.

The donee of a cheque, then, obtains merely a determinable *authority* to receive payment, and no rights in any kind of property beyond the actual paper upon which the cheque is written. Thus the plaintiff in this case obtained no right through the cheque to any sum of money, and there was no separate delivery, and therefore no gift, of any sum of £700.

The single case which supported the contention that a gift of a cheque acts as an assignment of the money there represented, was *Bromley v. Brunton*, I.R. 6 Eq. 275. In that case, under circumstances almost exactly similar to the present ones, the plaintiff recovered the sum in question. *Bromley v. Brunton* was disapproved by the

Court of Appeal in the present case. Pollock M.R. attempted to distinguish it; Warrington L.J. distinguished it on slightly different grounds, holding it at the same time to be a bad decision; while Sargant L.J. definitely expressed the opinion that it should be overruled. All three united in holding that a gift of a cheque is not in itself an appropriation of the sum of money indicated on the cheque, and that the sum therefore could only be recovered on the cheque through the bank, and that only in the lifetime of the donor.

It may be mentioned in conclusion that there is no difference in the law on this subject between a gift of a cheque *inter vivos* and one *mortis causa*. Chalmers states, in his "Bills of Exchange" (8th ed., p. 289), that a gift of a cheque *mortis causa* is effectual to pass property in the amount in the bank, if the cheque is merely *presented* before the death of the donor. This view is based only on the case of *Bromley v. Brunton* (which, incidentally, was *not* a case of *mortis causa* as Chalmers states, but a gift *inter vivos*), and can therefore no longer be regarded as a true statement of the law.

R. W.

NEGOTIABLE INSTRUMENTS—BANKERS' NEGLIGENCE—CHEQUE
STOPPED—WRONG NUMBER MENTIONED—DUTY OF INQUIRY.

Hilton v. Westminster Bank. House of Lords—1927 70 S.J. 1196,
reversing Court of Appeal, 135 L.T. 358; 42 T.L.R. 423.

On July 31st plaintiff drew a cheque, No. 117285, post-dated to August 2nd. On August 1st he sent a telegram to his bank stopping payment of cheque No. 117283; mentioning the date, payee and amount correct for No. 117285, which number he intended to have written. On August 2nd he telephoned to the bank, and asked whether it had received the telegram countermanding a cheque post-dated August 2nd, but did not mention the number. On August 6th, cheque No. 117285 was presented and paid. The plaintiff sued the bank for negligence in paying the cheque without inquiry.

Held by the House of Lords, reversing the decision of the Court of Appeal, and restoring the judgment of Horridge J., that under the circumstances the bank had not been guilty of negligence.

A bank is under a duty towards its customer to refuse payment of a cheque which the customer has countermanded. It is also clearly under a duty in some circumstances of making certain inquiries concerning cheques countermanded.

The Court of Appeal (Bankes L.J. giving judgment), held that by reason of—

- (a) the comparatively long interval between the notice of countermand and the presentation of cheque No. 117285;

- (b) the description in the telegram, other than the number, applying to cheque No. 117285, and
- (c) the description through the telephone, applying also to cheque No. 117285,

the bank had sufficient time and cause to be put on to their inquiry, both before presentation of the cheque, when they would have found that cheque No. 117283 had already been paid, and on its presentation, when they should have refused payment until they had made inquiries as to whether No. 117285 was not the cheque intended to be stopped.

More than one objection may be raised to the decision of the Court of Appeal.

First, even assuming that in this particular case the bank were under a duty to make inquiry, their attention *was* in fact attracted, on the presentation of No. 117285, by the similarity between its payee and amount, and that mentioned in the telegram, and on the telephone; they came to the quite reasonable conclusion that this cheque had been drawn in place of No. 117283, which had been stopped. This should constitute quite sufficient inquiry by the bank, since it satisfied in a reasonable way any suspicions which they might have entertained.

Secondly, since the only unequivocal and unique description of a cheque is its number, then, if a bank is instructed to stop a cheque of a certain number, it should not be required to look beyond that number for identification, or to take notice of descriptions of the amount, date or payee, which might well apply to more than one cheque.

Thirdly, all the duties of a bank towards its customer arise from implied contract, though some are now regulated by law. If the bank were held to have been negligent in this case, its negligence would seem to arise out of a duty to guard against the negligence of a customer, namely, in carelessly writing the figure 3 instead of 5; the bank would thus be liable on an implied contract to shoulder a loss which a customer incurs through his own negligence. It is hard to say that this responsibility is actually contemplated by a bank, and an implied contract is always an obligation which a party may be reasonably assumed to have tacitly undertaken.

Finally, though a bank may be under a duty to take precautions, it must also, from its very nature, act quickly. If actions of the present kind were to succeed, and a bank were held liable on any of the many such quick decisions which it is required to make every day, and were required in each one either to anticipate or else to indemnify the carelessness of another party, the progress of business generally might be considerably retarded.

R. W.

TORT—DEFAMATION—INNUENDO—CAPABLE OF BEARING A DEFAMATORY
MEANING—TEXT TO BE APPLIED.

Tomkins and another v. Coates ("Times," July 21st, 1926).

Though this case adds nothing new to the law of defamation, it is, nevertheless, an interesting decision. The defendant had erected some houses, and for several years plaintiffs' firm had acted as his agents. After a quarrel with the plaintiffs he withdrew the agency from them and erected in the gardens of two of the houses notice boards to the effect that the houses were for disposal. In a prominent position at the foot appeared the words "Messrs. T., etc., are *not* agents for this house." The lettering was in red, but the word "not" was in black.

As the words complained of amount *prima facie* to an innocent statement of fact, the plaintiff had to prove an "innuendo" before he could succeed. He had to show that the words were capable of bearing a defamatory meaning, and that in the circumstances they did convey such a meaning. The words "capable of bearing a defamatory meaning" are ambiguous. It is not sufficient that a defamatory construction might possibly be put upon the words. "It is unreasonable that where there are a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document" (Brett L.J. in *Capital & Counties Bank v. Henty & Sons*, 7 A.C. 748). In the same case Lord Selborne said: "The test is whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense." This is a question of law for the court to decide.

Cases similar to this are *Capital & Counties Bank v. Henty & Sons*, 7 A.C. 748, *Nevill v. Fine Art, etc., Insurance Co.* (1877) A.C. 68, and *Mulligan v. Cole* (1875) L.R. 10 Q.B. 549. In *Capital & Counties Bank v. Henty & Sons*, H, a brewer, sent to his customers the following circular: "Messrs. H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of C. & C. Bank" In *Nevill v. Fine Art Insurance Co.*, N. had resigned his agency to the company, whereupon the company's secretary sent circulars to all their clients who usually insured through N. in which were the words: "The agency of N., etc., has been closed by the Directors." In both these cases it was held that the words complained of were not capable of bearing a defamatory meaning, but it must be noted that publication was made to a limited class only. In *Mulligan v. Cole*, however, the publication was more general. M. had been employed in the Walsall Science and Art Institute, but left it to become headmaster of a new institution, the Walsall Govt. School of Art. The W.S. & A. Institute then inserted a notice in the local newspapers: "The public are respectfully informed that M's. connection with the Institute has ceased, and that he is not authorised to receive subscriptions on its behalf." Here, again, it was held that these words were not capable of bearing a defamatory meaning. Properly understood they

served to prevent confusion arising from M's. connection, at different times, with two institutes of a similar name. This case seems to be very similar to the one we are considering, where the words complained of, properly understood, serve to prevent confusion arising from the plaintiff's former connection with the defendant. This was the view taken by the judge, who held there was no case to go to the jury.

B. E. K.

TORT—EASEMENT—ANCIENT LIGHTS—STANDARD OF MEASUREMENT.

Horton's Estate, Ltd., v. James Beattie, Ltd. [1927] 1 Ch. 75.

The plaintiffs in this action asked for an injunction restraining the defendants from building so as to obstruct the ancient light in their premises and for an order to pull down. The defendants contended in defence that, even if the premises were now inadequately lighted according to ordinary standards, such standards were inapplicable to a manufacturing town such as Wolverhampton; and that therefore no actionable nuisance had been committed. Russell J. declined to accept this contention; for there is no reported decision which directly supports this argument, although references to locality have sometimes been made in decisions concerning nuisances by noise, smell and occasionally the obstruction of light.

The argument of the defence relied upon the support of *Jolly v. Kine* [1907] A.C. 1, in which the House of Lords upheld a judgment based upon the assumption that a nuisance by obstruction of light might be actionable, taking the locality into account, although the obstruction left the room still well-lighted. *Salvin v. North Brancepeth Coal Co.* (1874) 9 Ch. 705, might also appear at first sight to support this contention. It was there held that no action would lie in respect of an alleged nuisance caused by the smoke issuing from a chimney of the defendants, because, in the presence of other collieries in the district, the defendants had not created a new state of things. Some possibility of confusion arises from the custom which has recently grown up of deciding cases of obstruction of light on the basis of nuisance; but in *Salvin's Case* it must be remembered that the plaintiff suffered little, if any, more discomfort after the opening of the defendant colliery than he had done before; this is very different from the assertion that because the right to ancient light is very unusual in a manufacturing area, the party having that right is debarred from using it.

It is not so easy, however, to deal with *Jolly v. Kine*. This case, upon the face of it, is very difficult to reconcile with *Colls v. Home and Colonial Stores* (1904) A.C. 179, which is the leading case on the subject of ancient light, and which lays down as a general principle that an obstruction to light is actionable if it deprives the dominant premises of that quantum of light which is necessary for the purpose for which the room or rooms are used, according to the ordinary notions of man-

kind, and not otherwise. *Jolly's Case* apparently obscures, if it does not conflict with, this principle, Lord Loreburn L.C. quoting the principle as laid down in *Coll's Case*, with the addition of the words, "and having due regard to the locality and surroundings." The case has not passed without criticism, being considered unsatisfactory and of uncertain interpretation, and being reconciled with the leading case on the grounds that it was decided upon the particular circumstances and in accordance with the express finding of a nuisance.

H. E. S. B.

TORT—MASTER AND SERVANT—SCOPE OF EMPLOYMENT—IMPLIED
AUTHORITY—PROTECTION OF MASTER'S INTERESTS.

Poland v. John Parr and Sons. [1927] 1 K.B. 236 (Court of Appeal).

This is an interesting case on the liability of a master for the acts of his servant. It decides that a servant is acting within the scope of his employment if he acts, even outside his hours of work, for the protection of his master's property, under the mistaken, but honest, belief that it is in danger.

The defendants' cart, containing bags of sugar, was being driven on the highway. H, a servant in their employment, though not at the time actually at work, happened to be walking along behind it, when he noticed the plaintiff with his hand on the bags of sugar. Honestly believing that he was stealing, and, with the sole object of protecting his master's interest, H struck the plaintiff, who fell, and was run over by the waggon. The action was for damage caused by the negligence of the defendants' servant.

In deciding if H was acting within the scope of his employment, two questions were involved :—(a) Had H any authority to act at all; (b) if so, was his act within the scope of his authority, that is, was it merely a mode of doing an authorised act, or was it a wholly independent act? The court was unanimous in answering both questions in favour of the plaintiff. As regards the first, Atkin L.J. said that "Any servant is, as a general rule, authorised to do acts which are for the protection of his master's property." The fact that H was not actually at work when the emergency arose, does not negative his implied authority to protect his master's property. "An act is not placed beyond the scope of the servant's duty by the mere fact that it is not one of the class of acts which he is specially employed to do, or that the time is not an hour at which he is ordinarily at work" (Scrutton L.J. at p. 244). Counsel for the defence suggested that a master cannot impliedly authorise an act which he could not lawfully do himself, and cited in support the Irish decision of *McNamara v. Brown* [1918] 2 I.R. 215. But that case is contrary to English decisions

(e.g., *Bayley v. Manchester Rly. Co.* (1873) L.R. 8 C.P. 148; *Seymour v. Greenwood* (1861) 7 H. & N. 355) and to the judgment of Esher M.R. in *Dyer v. Munday* [1895] 1 Q.B. 742.

As regards the second question, the judges were agreed that H's act, though perhaps unnecessarily violent, was done under an honest belief that his master's property was in danger, and was not so excessive as to take it out of the class of acts he was authorised to do. H was therefore acting within the scope of his employment, and the defendants were liable.

At first sight this case might seem to conflict with *Hanson v. Waller* [1901] 1 K.B. 390 (servant under mistaken impression that his master's property was being stolen, gave plaintiff into custody: held, master not liable), but the distinction appears to be this. The servant in that case was not acting in order to protect his master's property, but for the sake of punishing the plaintiff. In both cases the servant acted under a mistake, but in *Hanson v. Waller* it induced him to make an arrest *after* the time when the property had, as he thought, been stolen, whereas in this case the act was done to *prevent* theft. As Blackburn J. says in *Allen v. L. and S.W. Rly. Co.* (1870) L.R. 6 Q.B. 65: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has been done."

The distinction is well illustrated by the case of *Radley v. L.C.C.* (1913) 109 L.T. 162, where a servant, mistakenly thinking that the plaintiff had been riding without paying his fare, ran after and assaulted him. It was held that the master was not liable because his act was done, not for the sake of protecting his master's interest, but for the purpose of punishment. Nevertheless, the distinction may often be hard to draw, as the words of Lush J. in that case show: "Speaking for myself, I do not agree that the mere fact that what the conductor did was by way of punishment would of itself be sufficient to prevent the employer from being held responsible Suppose this conductor had found a boy actually riding on the step had pushed him off, and, not content with that, had cuffed or struck him at the time of pushing him off I can quite conceive a case in which the master might be liable for what his servant does, although what he does includes an act which could only be described as being intended to punish a person for some wrong which he had committed." Notwithstanding this dictum, it is submitted that the distinction is a valid one, though in cases where the servant's act partakes both of the nature of protection and of punishment, it is not yet clear whether the dominating motive is to govern the master's liability, or if any intent to punish, however slight, is to take the act out of the scope of employment.

Another point of interest in the case lies in a passage in the judgment of Bankes L.J. (at p. 242): "In deciding whether an act of a servant is one for which his master is responsible, the act must be regarded from two points of view. First, was it merely a wrong method of

doing an authorised act, in which case the master is responsible, and secondly, where the authority is not otherwise established, but has to be inferred from the circumstances, was the act one which was done for the servant's own purposes and not in his master's interest." Two interpretations are possible—one, that if the act was done for the servant's own purposes, the master is not liable; but this would be in conflict with *Lloyd v. Grace Smith and Co.* [1912] A.C. 716—the other that if a servant is acting in his master's interest, the master is liable; but this would conflict with the opinion of Blackburn J. in *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526: "It is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say it was within the scope of the footman's employment." Or, as Fitzgibbon L.J. expresses it in *Byrne v. Londonderry Tram Co.* [1902] 2 I.R. 457: "In my opinion it is not the law that the opinion of the servant as to what is for his master's interest is the test of the employer's liability." It hardly seems likely that Bankes L.J. was attempting to lay down an opposite rule. All that *Poland's* case is authority for is that if a servant honestly believes his master's property is in danger, and acts in its protection, he is acting within the course of his employment. It would seem that the principle (as yet) is confined solely to the special case of the master's property: there is no general proposition that if a servant honestly acts in what he believes to be his master's interest, the master is responsible.

A. P. L.

TORT—MASTER AND SERVANT—NEGLIGENCE—DOCTRINE OF COMMON EMPLOYMENT—SUPPLY AND NATURE OF STAGE APPLIANCES.

Laubach v. Co-optimists' Entertainment Syndicate, Ltd., and another.
[1926] 43 T.L.R. 30.

This case is an excellent illustration of the fact that the doctrine of Common Employment is still in existence. The principle—dating from *Priestley v. Fowler* (1837) 3 M. and W.1—has been overlaid by Statute with exceptions and technical rules of procedure and limitation but is still applicable in a large number of cases.

The facts are as follows. An actress employed by the defendant company, while swinging an Indian club on the stage during a performance, let it go; the club struck and injured a member of the orchestra. It appears that the actress had complained of the weight of the club to the stage manager on a previous occasion.

This action was brought against the company and the actress jointly.

The first point involved was whether or not the plaintiff and the actress were in common employment. This point has been decided in

Burr v. Theatre Royal, Drury Lane [1907] 1 K.B. 544; moreover, it is well recognised that a general common object of design is sufficient to constitute a common employment. "We must not over-refine but look at the common object, and not at the common immediate object." Pollock C.B. in *Morgan v. Vale of Neath Rly. Company* (1865) L.R. 1 Q.B. 149. It is clear, then, that the actress and the plaintiff were in common employment. This type of employment has not been excepted from the working of the Common Employment rule by the various acts.

The second point was more difficult. It was argued that the Indian club constituted plant and was defective for the purpose for which it was used. This argument would bring the case within the headnote in *Toronto Power Co. v. Paskwan* [1915] A.C. 734, which reads: "The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself and cannot be delegated to his servants." This headnote seems, however, to go further than the dicta in the case itself. Since that case the Court of Appeal in *Cole v. De Trafford* [1918] 2 K.B. 523 has apparently laid down the doctrine that questions as to plant come under the heading of the personal negligence of the master.

Banks L.J. in *Cole v. De Trafford* (*supra*) said: "All such accidents appear to me to fall within the class of accidents resulting from ordinary risks incidental to the particular employment. Although the risk may in this sense be an ordinary one, yet the case may fall within one of the recognised limitations upon the rule. One only of these limitations need be considered, namely, whether risk is due to the personal negligence of the employer. In such a case the law does not recognise the personal negligence of the employer as an ordinary risk, or one which as between himself and the servant the latter undertakes. . . . What will amount to personal negligence on the part of the employer must depend upon the circumstances of each case."

Finlay J., in giving judgment for the defendant in the present case, followed this principle. He said: "My impression is that it is to some extent a question of degree. I think there may be cases, as, for instance, in the fitting up of a mine or great factory, when it would be correct to arrive at the same conclusion as in the *Toronto Power Co.* case (*supra*).'' In the case of the ordinary running of a theatre, however, this strict rule does not apply. The master can only be responsible for the negligence of a delegate in the case of plant which requires special supervision.

I. R. P. H.

TORT—NEGLIGENCE—CAR STARTING DOWN HILL OF ITSELF—
DAMAGE—RES IPSA LOQUITUR—OWNER OF CAR NOT IN PHYSICAL
CONTROL—RIGHT OF CONTROL—RESPONSIBILITY.

Parker v. Miller. 42 T.L.R. 408.

This case affords a new example of the application of the rule *Res ipsa loquitur*, and clears up a doubt as to who is a servant or agent in certain cases. The defendant was the owner of a motor car, and frequently allowed a friend, L, to drive it. On the occasion in question the defendant got out of the car and allowed L to drive it to the latter's house, the defendant following on foot. The house was situated on a steep gradient; the car was left unattended in the road; and after standing half an hour it started backwards down the hill and crashed into the area of the plaintiff's house.

There were two questions to be considered. Was there any negligence, and, if so, who was liable? The general rule is that the plaintiff must prove negligence. "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care" (*Scott v. London Dock Co.*, 3 H. & C. 596, and *Pollock on Torts*, 12th ed., 452). This is commonly known as the rule of *res ipsa loquitur*, and has been held to apply where a barrel of flour fell from a warehouse window (*Byrne v. Boadle*, 2 H. & C. 722), and where a brick fell from one of the piers of a railway bridge (*Kearney v. London, Brighton and S. Coast Rly. Co.*, Ex. Ch. L.R. 3 Q.B. 759), in each case injuring a passer-by on the highway beneath. In this case the defendant offered no explanation of the accident, and it was held that the rule *res ipsa loquitur* applied.

Having found that there was negligence, the second question was whether the owner of the car could be held liable. The law on this point was well stated in *Samson v. Aitchinson* [1912] A.C. 844. The facts were as follows. Defendant was owner of a car which he was trying to sell to the mother of C. Defendant and C went out in the car, C driving, to test its hill-climbing powers. Owing to the negligence of C an accident occurred, and the owner of the car was held liable. In delivering the judgment of the Privy Council Lord Atkinson cited with approval the words of Williams J. in the Court of first instance. "I think that where the owner of an equipage . . . is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property, if, in his opinion, the necessity arises, he must be able to say to the driver 'Do

this,' or 'Don't do that!' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver The duty to control postulates the existence of the right to control No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control." Here the ground of liability is stated to be the right to control retained by the owner. But in applying the law to the facts of the case their lordships went on to state: "The mere fact that he (the owner) asked or permitted C, while he sat beside him, to drive the car, is, in their Lordships' view, not enough to establish *per se* that he had abandoned control of the car. And if the control of the car was not abandoned, then it is a matter of indifference whether C be styled the agent or servant of the appellant in performing that particular act, since it is the retention of the control, which the appellant would have in either case, that makes him responsible for the negligence which caused the injury." Here the ground of liability stressed was not the right to control, but the actual retention of physical control, and this led to some confusion in the law.

A servant or agent is defined as a person subject to the command of his master or principal as to the manner in which he shall do his work (Pollock, *Law of Torts*, 12th ed., 80). But, says Pollock, "It is proper to add that the 'power of controlling the work' which is the legal criterion of the relation of a master to a servant does not necessarily mean a present and physical ability." (p. 84). Yet, in referring to the case of *Samson v. Aitchinson*, p. 82, he seems to consider the "present and physical ability" of the owner a necessary element of his liability. We have seen the reason for this confusion; it was dispelled by the judgment of the Master of the Rolls in this case. The case of *Samson v. Aitchinson*, he said, could not be used as laying down a fresh principle that if you found the owner of a car in the proximity of the car when an accident happened, a different kind of liability could be attached to him. The test of agency, said Scrutton L.J., in the cases of negligence has, ever since *Quarman v. Burnett* (6 M. & W. 499), been not physical control, but the right to control. There was evidence in this case that the owner had not surrendered his right to control (L having mere custody). L was the agent of the owner, who must, therefore, be held liable for L's negligence.

B. E. K.

TORT—TREE OVERHANGING HIGHWAY—NUISANCE—RYLANDS v. FLETCHER.

Noble v. Harrison. [1926] 2 K.B. 332.

The defendant was possessed of land on which was growing a tree, a limb of which overhung a highway. This bough suddenly broke in fine weather, fell on the plaintiff's vehicle then passing and caused damage. The County Court judge found that neither the defendant nor his servant knew that the bough was dangerous, but that the fracture was due to a latent defect not discoverable by any reasonably careful inspection. The County Court judge gave judgment for the plaintiff, finding the defendant liable (1) as for nuisance, and (2) on the principle of *Rylands v. Fletcher* [1886] L.R. 1 Ex. 265. The defendant appealed.

The interest of this case lies in the attempt to extend the doctrine of strict liability. A dictum of Best J. in *Earl of Lonsdale v. Nelson*, 2 B. & C. 302, suggests that a tree overhanging a highway is a nuisance: "It is an actionable nuisance if a tree growing on my land overhangs a public road or my neighbour's land." But in regard to a public road it can only apply if the branches actually obstruct free passage along the highway. "The right of the public on a highway is merely to pass and repass."

Two judgments in the case of *Tarry v. Ashton*, 1 Q.B.D. 314, on which the plaintiff laid great weight, suggest that if a thing overhanging a highway does in fact fall and do damage, it must have been a nuisance. A lamp was suspended in front of the defendant's house and through a defective fastening fell on the plaintiff. The defendant had known that the lamp was unsafe and constituted a nuisance and he had employed a contractor to repair it. This the contractor had failed to do adequately. Judgment was given for the plaintiff. Blackburn J. held the defendant liable on the ground that he had been negligent and doubted whether he would have been liable otherwise. Lush and Quain JJ. seem to have thought that even if there had been no negligence on the part of the defendant he would have been liable. The argument was that if you place a thing such as a heavy lamp over a highway you must keep it in such a state as not to be dangerous and you cannot get rid of the liability by saying that you employed a proper person to put it in repair. In the present case Mr. Justice Rowlatt sought to distinguish *Tarry v. Ashton* on the grounds that a lamp is of a totally different nature to a tree. A heavy article such as the lamp in question clearly needs support and in the absence of care will become a dangerous thing. The branch of a tree in the natural course of events supports itself, and in the absence of negligence it would be putting too great a burden on a landowner to make him an insurer of nature. This distinction would be a difficult one to apply generally. It is submitted that the true ground for the decision in *Tarry v. Ashton* was that the defendant had been negligent; and that the better view here is that of Mr. Justice Wright who rejected the reasoning of Lush and Quain JJ.

Could the defendant be liable under the rule in *Rylands v. Fletcher*? Can a tree be considered a dangerous substance accumulated on the land? The limits of that rule were to some extent explained in *Richards v. Lothian* [1913] A.C. 263, where *Blake v. Woolf* [1898] 2 Q.B. 426, was cited with approval: "that general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way, and damage happens to the adjoining property, without any default or negligence on his part no liability attaches to him." Here the defendant was using his property in the ordinary way. Moreover, there is a distinction between a thing intrinsically dangerous and one only dangerous under certain circumstances. On the one hand the branch of a tree is not intrinsically dangerous like a wild beast, and on the other hand, unlike water, it is not made more dangerous by accumulation. There is nothing unusual or necessarily dangerous in a beech tree.

The Divisional Court allowed the appeal as the branch neither constituted a nuisance nor came within the principle of *Rylands v. Fletcher*.

E. B. S.

TORT—*VOLENTI NON FIT INJURIA*—KNOWLEDGE OF RISK.

Letang v. Ottawa Electric Railway Company. [1926] A.C. 725.

This case was on appeal from the Supreme Court of Canada. The facts as to the place of the accident were that the respondent railway company had built, for the convenience of railway passengers, a series of concrete steps. On the day of the accident the steps were in a dangerous condition through the presence of ice. No prohibition or warning against use was made, nor were any of the things done, which were mentioned in the evidence as reasonable to be done, in order to avert the danger. For the convenience of persons using the stairs there was a handrail. The plaintiff's wife kept hold of this, but, owing to a sudden slip, she fell and was injured.

The plaintiff won in the Superior Court of Quebec, and in the Provincial Court of Appeal, but lost in the Supreme Court of Canada. The original judgment in favour of the plaintiff was restored by the Privy Council.

In the later stages the case was argued as one to which the maxim *Volenti non fit injuria* applied. In the judgment of the Privy Council Lord Shaw quotes from the cases of *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685, and *Osborne v. London and North Western Railway Co.* (1888) 21 Q.B.D. 220. The relevant passages of the judgments are:

(1) Bowen L.J. in *Thomas v. Quartermaine*: "The maxim, be it observed, is not '*scienti*' *non fit injuria*, but '*volenti*' . . . Knowledge is not a conclusive defence in itself. But when it is know-

ledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete."

(2) Wills J., in *Osborne v. London and North Western Railway Co.*, who said: "If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

From these judgments it will be seen that in the application of the maxim *volenti non fit injuria* there are two questions to be decided. The first is: Did the plaintiff have full knowledge of the nature and extent of the risk he ran? If this is answered in the negative then the defence fails, and no further matters need be investigated. If, however, the question is answered in the affirmative, then a second one—Did he impliedly agree to run the risk?—has to be decided. If this second question is answered in the affirmative then the defence of *volenti non fit injuria* is complete.

Lord Shaw in the judgment scarcely brings out the fact that once the first question is negatived there is no necessity to proceed further. He applies the first question to the facts in the case, answers it in the negative, and then applies the second, treating it in a like manner.

The first proposition above, requiring proof of the full knowledge of the risk on the part of the plaintiff to establish a defence, places a heavy burden on the defendants. In most cases it will be difficult to convince a jury that the plaintiff incurred serious risk with full knowledge of the danger, although he may have been aware of conditions that involved some danger of an accident.

H. J. H. W.

STRIKES—CRIMINAL OR CIVIL ILLEGALITY OF GENERAL STRIKE—NATURE OF TRADE DISPUTE.

National Sailors' and Firemen's Union of Great Britain and Ireland v. Reed and Others. [1926] 1 Ch. 536.

In this case the plaintiff Union asked for an injunction against the defendants, who were the officials of one of its branches, to enjoin them from calling out the members of that branch in support of the policy of the Trades Union Congress. According to the rules of the plaintiff Union certain benefits were given on condition that no strike in the Union should be proclaimed without the consent of a two thirds majority of the men ashore, which in this case had not been obtained.

Astbury J. granted the injunction, firstly, on the ground that the strike was contrary to the rules of the Union. About this there was no dispute, and Sir Frederick Pollock points out ((1926) L.Q.R. 290)

that this was all that was necessary for the granting of the injunction. Thus we must look upon the second ground for granting the injunction, viz., that the strike was illegal, as an extra-judicial dictum. In giving this as his second ground, Astbury J. said: "The so-called general strike called by the Trades Union Congress is illegal and contrary to law, and those persons inciting or taking part in it are not protected by the Trade Disputes Act of 1906. No trade dispute has been alleged or shown to exist in any of the Unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other. The orders of the Trade Union Council above referred to are therefore unlawful, and the defendants are at law acting illegally in obeying them, and can be restrained by their own Union from doing so."

It is impossible to tell what Astbury J. meant by "illegal." He might have implied either that the strike was illegal civilly or criminally illegal. The only crimes that could have been committed by those who incited the general strike were treason, seditious conspiracy or seditious libel and criminal conspiracy. But their acts constitute none of these crimes. The purpose of the general strike was merely to bring pressure upon Parliament, which is not an unlawful offence, unless actual threats of physical force are made.

The question whether the strike was civilly illegal depends upon the construction of section 5, sub-section 3, of the Trade Disputes Act, 1906, which reads as follows: "In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour in trade or industry, whether or not in the employment of the employer with whom the dispute arises." This should be read in conjunction with section 3 of the Act: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment. . . ."

The question at issue in this case was whether the defendants were acting in furtherance of a trade dispute. There have unfortunately been no previous decisions exactly in point, since it has never come within the cognisance of the Courts under similar circumstances. But a dictum of Loreburn L.C., in *Conway v. Wade* [1909] A.C., at page 512, seems to be relevant to the matter in hand. "The section (of the Trade Disputes Act) cannot fairly be confined to an act done by a party to the dispute. . . . A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole of the industry that either the employers or the workmen may think a general lock-out or a general strike is necessary to gain their point. Few are parties but all are interested in the dispute. If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity with other peoples' work or business, a jury would be entirely justified in saying that what he did was done, not in furtherance of the

trade dispute, but of his own designs, sectarian, political or purely mischievous, as the case might be."

The Act does not confine the acts done in furtherance of a trade dispute to allied industries, and so we may take the dictum one step further, and say, for example, that a strike of shoemakers in furtherance of a trade dispute existing between workmen and employers in the shipping trade would come within the meaning of the Act, as done in furtherance of a trade dispute. Thus the strike called by the defendants, if it had been called in accordance with the rules of the Union, could not have been otherwise than within the Act. The facts were, however, that the strike was not called in conformity with the rules of the Union; but Astbury J. went one step further, and said that the strike was illegal, since it was not called in furtherance of a trade dispute. "No trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other." In this case the T.U.C. would be the meddler as described by Loreburn L.C. But we are equally at liberty to take the view that the strike was called in furtherance of a trade dispute existing between miners and their employers in the mining industry. From this point of view the strike called by the defendants came within the meaning of the Act.

The judgment merely decides that in this particular case the Union was acting contrary to its rules, and that the T.U.C. has no authority to order a strike contrary to the rules of an affiliated Union. They cannot use their funds in breach of their rules any more than a corporation can act *ultra vires*. The judgment neither defines a trade dispute nor does it make a general strike illegal. So long as the Trade Unions use their funds in accordance with their rules, there is no reason to suppose that a sympathetic strike ordered by the T.U.C. through the executives of the Unions and spreading to all the vital industries of the country should not be within the meaning of the Act if done in furtherance of a trade dispute already existing in one industry. The judgment merely makes it impossible for the T.U.C. to issue orders directly to affiliated Unions in violation of their rules.

W. E. W.

FACTORS ACT—POSSESSION—ESTOPPEL.

Lowther v. Harris. 43 T.L.R. 24.

L, the plaintiff, was the owner of two tapestries, known as the X and the Y tapestries, respectively. Both were kept in a house owned by L, and one P, who resided there, was employed to negotiate for the sale of any article in the house. He was not, however, given the power to sell or remove anything without L's consent. He was given permission to sell, remove and deliver the X tapestry for a certain price to one W, who did not, in fact, exist, and instead he sold it to H for a

much smaller sum. Later, without L's knowledge or consent, he removed the Y tapestry and sold it also to H, who, in both cases, took the goods *bona fide* and for value. When his dishonesty was discovered, P was prosecuted and convicted, and L brought this action against H for conversion.

The points at issue were :

1. Was P a mercantile agent within 52 & 53 Vict. c. 45?
2. Did P have possession of the tapestries?
3. Is L estopped from denying that P had authority to sell?

As regards 1 a mercantile agent is defined in the Factors Act as "a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods." Therefore P was an agent within the meaning of the Act, in spite of his being employed in that capacity by no one but L (*Weiner v. Harris*, 26 T.L.R. 96), and this is supported by the fact that P gave receipts and took cheques in his own name and was paid a commission.

As to 2 The Factors Act says that "A person shall be deemed to be in possession of goods or of the documents of title to goods, when the goods or documents are in his actual custody or are held by any other person subject to his control or for him on his behalf." Consequently while the goods were in L's house, they remained in his possession, as P was merely a licensee. When, however, the X tapestry was handed over to P for sale, he then acquired possession as a mercantile agent (*Baines v. Swainson*, 4 B. & S. 270; *Vickers v. Hertz*, L.R. 2 H.L. Sc. 113). In this case P was guilty of either larceny by a bailee or obtaining goods by false pretences, neither of which would vitiate the consent of the owner to the agent's possession (*Whitehorn Bros. v. Davidson* [1911] 1 K.B. 463; *Folkes v. King*, 39 T.L.R. 37). Consequently P had possession as a mercantile agent, and, as H received the X tapestry without notice and for value, he is therefore entitled to it under the Factors Act, 1889.

As to the Y tapestry, L never parted with possession, and P merely stole it from him and purported to sell it to H. Defendant's plea of estoppel at Common Law is invalid, because it is essential for it to be established that there should be a representation, express or implied, by the owner and known to the purchaser that the goods are being sold by his authority. In this case H did not inquire or consider whether P was principal or agent. Further, the plaintiff did nothing to indicate, expressly or impliedly, that P was selling the Y tapestry on his behalf.

The plaintiff was therefore held entitled to recover damages in respect of the Y tapestry alone.

G. M. P.

WILL—SEAMAN'S WILL—WRITING ON EGGSHELL—WILLS ACT, 1837
(1 VICT. c. 26), s. 11.*Hodson v. Barnes.* 43 T.L.R. 71.

In this case the facts were as follows. The defendant's husband, who was a pilot on the Manchester Ship Canal, had made a will in the ordinary form in 1920. After his death, the defendant found in his bedroom an eggshell, on which was written "17 ——— 1925. Mag. Everything I possess. J.B." The handwriting and initials were those of the deceased, and "Mag." the name by which he called his wife. The defendant claimed that this was a lawful will.

The points at issue were :

1. Did the testator intend that this writing on an eggshell should be deemed his will?
2. Was the testator "a mariner or seaman at sea" within the meaning of 1 Vict. c. 26, s. 11?

As regards 1 it can hardly be conceived that a man in the testator's position should have chosen such an extraordinary way of making a will on material so likely to be destroyed or thrown away.

As to 2, although there are cases in which nuncupative wills are held good even if made in harbour (*In re McMurdo* [1867] L.R. 1 P. & D. 540) or on a ship when lying within a river (*In bonis Patterson* [1898] 79 L.T. 123), in every case the position of the testator corresponded to that of a soldier *in expeditione*. In the present case the testator's duties were partly on shore and partly at sea, and for certain purposes he would be classed as a seaman within the meaning of the Act, which allows nuncupative wills for "any soldier being in actual military service or any seaman or mariner at sea." But there is nothing to show that in the present case his position corresponded to that of a soldier *in expeditione*, which is essential for the validity of such wills.

Judgment was given for the plaintiffs.

G. M. P.

INJUNCTIONS IN PERSONAL SERVICE CONTRACTS—RESTRAINT OF TRADE.

Rely-A-Bell Burglar and Fire Alarm Co. v. Eisler and Others.

[1926] 1 Ch. 609.

This case is of interest as illustrating the modern tendency of the law with respect to contracts in restraint of trade, and as showing the spheres proper to damages and injunction as remedies for the breach of the terms of a contract of service.

The facts were that the defendant E entered the employment of the plaintiffs under an agreement that during the term of the agreement he would serve them faithfully and would not enter any other employment nor have any interest in any other concern carrying on the same business. In breach of this agreement he entered the service of a competing company I and became pecuniarily interested in it. The plaintiffs thereupon asked for an injunction restraining E from serving I.

The first question was whether the contract was void as being in restraint of trade. The present case does not deal with the covenants of a vendor of a business for the protection of a purchaser, but with the covenants of an employee, where, as Lord Cozens-Hardy said in the case of *Morris v. Saxelby* [1915] 2 Ch. 77, there is "less freedom of negotiation and a greater risk of oppression," so that "the court ought to guard more carefully the risks of the covenantor." But this applies to covenants which only come into operation on the termination of the employment. Sir Frederick Pollock ("Principles of Contract," at pages 43-4) says: "It has never been doubted that a partner may bind himself absolutely not to compete with the firm during the partnership; so may a servant in a trade bind himself absolutely not to compete with the master during his time of service." And this is the present case: it is a question of the defendant's breach of his covenant while he was still the servant of the plaintiffs. Therefore the present contract was not in restraint of trade.

Having held the contract to be valid, the further question arises whether the plaintiffs were entitled to an injunction restraining the defendant from continuing to serve the defendant I. In the case of *Lumley v. Wagner* (1852) 1 D.M. & G. 604, there was a contract of service partly positive and partly negative. The court declined to enforce the positive part specifically, but it restrained the breach of the negative part by injunction. "It has been thought to follow from . . . some parts of the judgment in *Lumley v. Wagner* that the principle in that case is not confined to cases where the negative stipulation is express, but applies also to others where the negation is implied [Fry on Specific Performance, ed. vi., p. 397]. But in the case of *Whitwood Chemical Company v. Hardman* [1891] 2 Ch. 416, where a company's manager had covenanted "to give the whole of his time to the company's business," an injunction was refused in view of the absence of negative stipulations. And in the words of Lindley L.J., *Lumley v. Wagner* is an "anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend." Even, however, in contracts where there is a negative stipulation, an injunction will not invariably be granted. Lord Selborne in *Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co.*, L.R. 16 Eq., 440, said: "If the substance of the thing is such that the remedy ought to be sought elsewhere [than in Chancery], then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative."

In a case similar to the present one, *Ehrmann v. Bartholomew* [1898] 1 Ch. 671, where a contract of service had been made containing a negative stipulation that the employee should not enter any other employment during the validity of the agreement, Romer J. refused to grant an injunction restraining him from doing so. To have granted it would have amounted to enforcing specific performance of a contract of personal service, by preventing the plaintiff from gaining a livelihood in any other concern; and this the courts have always refused to do. Such an injunction will only be granted where there are special circumstances as, for example, where the servant has been put in possession of trade secrets (*Robinson v. Hener* [1898] 2 Ch. 481). As there were no special circumstances in the present case the Court refused to grant an injunction restraining the defendant E from serving the defendant company I. The plaintiffs, of course, were entitled to damages for the breach of the contract, and the defendant E was restrained from having any interest during the period of the agreement in any concern but that of the plaintiffs carrying on the same business.

R. S. J.

TORT—INTERFERENCE WITH CONTRACTUAL RELATIONS—VIOLATION
COMMITTED KNOWINGLY AND WITHOUT JUSTIFICATION.

G.W.K., Ltd., and others v. Dunlop Rubber Co., Ltd. 42 T.L.R. 376;
affirmed in the Court of Appeal, 42 T.L.R. 593.

The first plaintiffs (*G.W.K., Ltd.*), who were makers of motor cars, entered into an agreement, known as a "Standardisation" agreement, with the second plaintiffs (the *A.R.A.M. Co., Ltd.*), who were makers of motor car tyres, whereby it was agreed that all cars manufactured by the first plaintiffs should, when sold or offered for sale, be fitted with the tyres of the second plaintiffs (save where a customer otherwise ordered). The first plaintiffs sent two of their cars, duly fitted with tyres made by the second plaintiffs, to the Scottish Motor Show. On the night before the Motor Show opened workmen of the defendant company, acting under the instructions of the defendant company, removed the tyres on the two cars and substituted tyres made by the defendant company. These latter tyres remained on the cars for a day and a half, when, after remonstrances from both plaintiffs, the defendants' workmen removed the tyres and the original tyres were restored. On these facts the first plaintiffs sued for trespass and the second plaintiffs for interference with their contractual rights. The jury awarded the first plaintiffs £500 and the second plaintiffs £2,000. There was no contest as to the claim of the first plaintiffs, but, as to the award for the second plaintiffs, the Lord Chief Justice, after hearing arguments on both sides, gave a reserved judgment in favour of the second plaintiffs in accordance with the finding of the jury.

In his decision Lord Hewart treated the case as in direct succession to the well-known actions, which, in their modern form, commenced with *Lumley v. Gye*, for inducing or procuring a breach of contract. A definition of the tort would run—any person who, knowingly and without lawful justification, induces a second person to break his contract with a third person, whereby that third person suffers loss, is liable to that person. The rule was laid down in the oft quoted words of Lord Macnaghten in *Quinn v. Leathem* [1901] A.C. 495, in which he points out the true basis of the tort and clears up a misapprehension as to the necessity of malice: "Speaking for myself I have no hesitation in saying that I think the decision (*i.e.*, in *Lumley v. Gye*) was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." Now that principle is a wide one, and can be made to cover many cases, such as the present case, which would have given food for thought to the judges who decided *Lumley v. Gye*.

It is interesting to consider the elements involved in the *Lumley v. Gye* type of case of inducing a breach of contract. It is also necessary to discuss an important difference between that type of case and the present.

(a) There must be a contractual relationship. The older cases were mainly cases of service contracts, and, even down to 1908, some judges thought that the action was confined to such contracts. But the Court of Appeal, in the *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., Ltd.* [1908] 1 Ch. 335, refused to accept any such limitation, and allowed its application to the case of an undertaking by selling agents with a manufacturer not to supply goods to persons on a "suspended" list. The only limitation that at present definitely exists lies in the fact that actual damages must be proved, and consequently the contract must in some sense be a continuing one. In Halsbury, Vol. 27, at p. 476, it is suggested that: "The answer to the question cannot depend on the nature of the contract, and must depend on the question whether the contract is such that a breach of it is capable of causing damage to one of the parties to it by prejudicially affecting the legal rights arising out of it and, in particular, the legal right inherent in a contract, to enforce it at law." On this point the present contract was very similar to the *National Phonograph Case*, and was therefore covered by authority.

(b) There must be knowledge of the existence of the contractual relation. As a rule a contract can only cast duties upon the parties to it. Nevertheless, it has, in certain cases, the incidental effect of casting duties upon other persons provided they become aware of the existence of the contract. In other words, you do not, in the realm of contractual relations, walk at your peril, and it may be suggested that the rule is a reasonable one, for, although in many branches of the Law of Torts,

knowledge of other persons' rights, or even existence, is immaterial (*e.g.*, in trespass or in libel), yet, if such rule of liability apart from knowledge were applied here, it would seriously interfere with that freedom in commercial matters so much to be desired in an industrial community. For example, it would be intolerable that on entering into a contract for the purchase of goods a merchant should have to inquire as to whether the seller had entered into any agreement with any other person, the terms of which would be broken by the contract he proposed to make, or run the risk of an action for inducing a breach of contract. Such a condition of things has only to be stated to be rejected. It is, however, worth pointing out that where there is knowledge of the contract, though conditions of sale cannot be annexed to goods so as to follow the property in the goods either at Common Law or in equity, *Taddy & Co. v. Sterious & Co.* [1904] 1 Ch. 354, nevertheless, there may be a remedy in tort under the rules here stated if the purchaser of goods has persuaded the vendor to break a contract of which the purchaser was aware, and it is probable that further attempts to get round *Taddy v. Sterious* by this road will be made in the future.

In view of the necessity of knowledge the statement in Kenny's *Select Cases on the Law of Torts*, 4th ed., p. 523, "It is now settled law that a party to a contract has not only a *jus in personam* against the other party, but also a *jus in rem* against the whole world" (made in view of the protection afforded by this action in tort), can hardly be regarded as correct. A party to a contract has a right available against a limited number of persons, namely, those who are aware of the contract.

(c) There must be an interference with that contractual relation. Here we stand on very doubtful ground, and the boundaries are not by any means apparent. We can at once dismiss one point which arises—the interference with the contract need not be such as to involve the other party to the contract in liability. The majority of the Court of Appeal in the *National Phonograph Case* were prepared to hold the defendant liable to the plaintiff, apart altogether from the question (upon the answer to which they could not agree) whether the interference was such as to enable the plaintiff successfully to sue the persons who were induced to break their contract. We need not, therefore, consider whether the first plaintiffs were liable to the second plaintiffs. But a more serious difficulty arises as to the method or the means employed. It is here that a clear distinction arises between the former cases—*Lumley v. Gye* down to the *National Phonograph Case*—and the present case. In all the former cases the interference has taken the form of acting upon the mind and the will of one of the parties to the contract, and persuading him by lawful means (as in *Lumley v. Gye*) or by unlawful means (as in the *National Phonograph Case*, where deceit was used), to break his contract. In the case under discussion the interference was entirely external—it is impossible to assert that the defendants had induced the first plaintiffs to break their contract with the second plaintiffs. What the defendants did was entirely against the

will of the first plaintiffs. In the previous cases the person inducing the breach of contract had done so by persuading one of the parties to a contract to enter into a second contract, the terms of which were inconsistent with the first contract. In the present case there was no contractual relationship between the defendant and the first plaintiffs. On this point it may be interesting to consider the position in the *National Phonograph Case*. There the plaintiffs had entered into an agreement with factors, whereby the latter, who were sellers of the plaintiffs' goods, were not to sell those goods to persons on a suspended list. The defendants, who were on the suspended list (to the knowledge of the factors), by taking false names, induced the factors to sell goods to them in breach of the terms in the factors' contract with the plaintiffs. There was, therefore, a contract between the factors and the defendants, which was no doubt voidable at the option of the factors on the ground of fraud, and the action of the defendants was at the same time a tort as against the factors, as it was against the first plaintiffs in the present case. But the distinction is that in the former case there was an inducement acting on the mind of one of the parties, in the present case the interference was entirely external. In fact, the acts of the defendant in this case could be put no higher (for our purpose) than the act of a thief who stole from A's library a book which A had contracted to sell to B—on the analogy of the present case the thief would be liable to B if he knew of the contract.

It is probable that other actions similar to the present action will be brought when the extent of the tort is realised. When, for example, a person who is standing in a theatre sees an empty seat and sits in it, and refuses to give it up on being requested so to do by the person who has a ticket for that seat, and has to be ejected by the management, or when a person takes a railway ticket (which does not entitle him to any particular seat, but only to be carried) and sits in a reserved seat and refuses to give it up on being requested so to do by the person who has bought a ticket for that seat, that person is liable to an action for interference with contractual rights at the suit of the person entitled to the seat. The chief difficulty here would lie in the fact that actual damage has to be proved.

(d) Actual damage must be proved. This was easily established in the case under discussion. It is clear that the more cars there are fitted with a particular maker's tyres, the better will that maker stand with the public.

(e) There was no attempt by the defendants to justify their conduct in face of the facts, but we must consider under what circumstances justification can be pleaded. It seems to be impossible to lay down any definite rule as to what can be regarded as a sufficient justification for interference with contractual rights. Sir John Salmond (*Torts*, 6th ed., p. 603) draws a distinction between advising a breach of contract and inducing a breach of contract, and says: "To induce a breach of contract means to create a reason for breaking it; to advise

a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter has never been held to be so and is probably innocent." This seems a fair test, but in practice it will be extremely difficult to distinguish advice and inducement. In an interesting article in the *Harvard Law Review*, Vol. 36, 1922-3, pp. 663-703, Mr. F. B. Sayre, after a review of English and American cases, among other results arrived at, suggests that "No action will lie for inducing breach of contract unless the defendant, in committing the act which caused the breach, sought the same object as did the plaintiff in making the contract. If the defendant's aim was some object foreign to that of the plaintiff in making the contract the defendant 'caused' but did not 'procure' the breach and is not liable." It may be suggested that English Courts are not so concerned with the object of the defendant save where he pleads justification, and are unlikely to look beyond the fact that the defendant has knowingly interfered with contractual relations.

It will be seen on looking into the Reports that very few cases can be found where justification has been successfully pleaded. The latest is *Brimelow v. Casson* [1924] 1 Ch. 302. Sir F. Pollock suggests (*Torts*, 12th ed., p. 327) that *Quinn v. Leathem* might well have been decided on the old line of authorities of which *Garrett v. Taylor*, Cro. Jac. 567, is a well-known example, since the cause of action was in effect ruining the plaintiff's business by coercing his customers not to deal with him. Lord Justice Bowen, in the *Mogul S.S. Co. v. McGregor, Gow & Co.*, (1889) 23 Q.B.D., p. 614, puts both the *Garrett v. Taylor* line and the *Lumley v. Gye* line of cases under the same general heading of wrongful injury, when he says "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden, so is the intentional procurement of a violation of individual rights, contractual or otherwise, assuming always that there is no just cause for it—the intentional driving away of customers by show of violence, *Tarleton and others v. McGawley* (1794) 1 Peake 270; the impeding or threatening servants or workmen, *Garrett v. Taylor*, Cro. Jac. 567; the inducing persons under personal contracts to break their contracts, *Bowen v. Hare*, 6 Q.B.D. 333, *Lumley v. Gye*, 2 E. & B. 216." The present case is certainly covered by the broad general principle laid down by Lord Bowen, but if we have to be more definite we may well ask whether the same old line of authorities mentioned by Sir Frederick Pollock might not well have been called into play here, and it may be suggested that there is in principle no distinction between such a case as *Garrett v. Taylor* and the present case.

Interference with contractual relations may therefore take one of two forms:—

(a) What may be termed internal interference where a third person persuades one of the parties to a contract to break that contract, as a rule by entering into a fresh contract with him himself.

(b) External interference, where a third person does a wrongful act which interferes with a contractual relationship between two other persons, the position being such that the act is done against the will of both those persons.

G. C. D.

THE LAW OF PROPERTY—TRUSTS FOR SALE.

In re Leigh's Settled Estates. [1926] Ch. 852.¹

Mrs. Tenison held land subject to a yearly rentcharge payable to her mother. On her marriage in 1923 she conveyed it to trustees on trust to sell and to hold the proceeds of the sale (or the rents and profits until sale) upon trusts declared in a settlement of even date; power was given to postpone the sale which was not to take place without her consent. The present summons was brought primarily to determine who was the tenant for life to whom under the new legislation the legal estate must be conveyed by a vesting deed. As the recipient of the annual income of the land, Mrs. Tenison came within the category of those persons who are to be deemed to be tenants for life (S.L.A. 1925, s. 20 (viii)), provided that the land was not held on trust for sale; in this latter contingency the trustees were entitled to the legal estate, and, with it, to all the powers of a tenant for life. Mr. Justice Tomlin decided that there was not a trust for sale.

We must first examine the considerations which led the learned judge to this paradoxical conclusion. He asked himself what is a trust for sale, and found his answer in the Law of Property Act, 1925, s. 205 (i) (xxix), where it is defined as

“an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale.”

The qualifying clauses of this definition are clear enough, and show that neither the power to postpone the sale nor the fact that its exercise was dependent on Mrs. Tenison's consent, bring the present case outside the meaning of the term. There remain the adjectives “immediate binding.” There is no difficulty about the significance of the former, which is to distinguish a trust for sale coming immediately into operation from one that is not intended to arise till the happening of some future event. The crux is the word “binding.” Tomlin J. held that it meant that the trust for sale must bind the whole unencumbered fee simple, and therefore must be capable of overreaching all prior charges. In the present case, the trust was not capable of over-

¹ This case was decided before the passing of the Law of Property (Amendment) Act, 1926. But see the last paragraph of Mr. Lightwood's article *supra* p. 74.

reaching the trust in favour of Mrs. Tenison's mother; therefore it was not binding, and so was not a trust for sale within the meaning of the new Acts.

Before considering the merits of this decision, let us pause to assess its disastrous consequences. If it is to be followed, nothing in future can be a trust for sale unless it is capable of overreaching prior charges. This attribute of overreaching is possessed only by a product of the new legislation which is known as a "special" trust for sale, *i.e.*, where the trustees are either a trust corporation or two persons approved by the Court. Accordingly, all those sorts of settlements which have hitherto been recognised as ordinary trusts for sale without power of overreaching are now no longer trusts for sale at all.

However, it was the duty of Mr. Justice Tomlin to interpret the Act without regard to the consequences; and if his interpretation was right, the responsibility for its calamitous results must fall not upon him but upon the draftsmen of the statute. Therefore, before further condemnation of his judgment, we must search for alternative and more satisfactory meanings of the word "binding."

Curiously enough, the only alternative advanced in the case was quite impossible. It was suggested that "binding" should be read in conjunction with "immediate" as meaning an immediately binding in antithesis to a future trust for sale. Apart from the fact that this significance is already amply conveyed by the one word "immediate," it should need extraordinarily powerful considerations to induce a judge to interpret an adjective qualifying the principal noun as no more than an adverb qualifying the word "binding."

It was suggested after the decision (by Mr. Lightwood in *Law Journal* 61, p. 554) that "binding" had been used by the draftsman as a synonym for "imperative." The word "imperative" has an established connection with trusts for sale and signifies that quality which distinguishes a trust for sale from a power of sale, *viz.*, that whereas the donee of a power may sell or not at his discretion, a trustee is bound eventually to sell. But it is obvious that "imperative," though explanatory, is tautological, since of its very nature a trust contains a command to sell. Therefore, it is at least arguable that the draftsman had no intention at all of including any equivalent for "imperative," since it would merely be a needless repetition, and that to put this interpretation upon "binding" would give it no separate significance.

A third alternative has since been propounded by Mr. Lightwood (*Law Journal* 62, p. 391) which is the most acceptable and the least apparent. Under this theory, "binding" is inserted in order to give expression to the decision in *Re Goodall's Settlement*, [1909] 1 Ch. 440, in which it was held that if by the instrument creating the trust for sale the settlors reserved power to direct that the trust for sale should cease to be exercisable, then there was no trust for sale within the meaning of the Settled Land Act, 1882, s. 63. In this sense "binding" would mean irrevocable. This interpretation secures reasonableness in

its application without ignoring the word or forcing an unnatural meaning upon it. "Binding" certainly can mean irrevocable, but it can mean several other things as well, and it would have saved much confusion if the draftsman had employed the narrower term.

But this meaning of the word does not jump to the surface of the mind, and, as far as the mere significance of the word itself is concerned, Tomlin J.'s interpretation of it is just as good. For, if one looked solely at the phrase in question—"an immediate binding trust for sale"—it would not be unnatural to suppose that the trust must be one that can bind the land. With great respect to Mr. Justice Tomlin, it is submitted, not that he distorted the phrase, but that in searching for a possible meaning, he restricted his outlook with unnecessary rigidity to the phrase itself. Had he taken into consideration the general sense of the statute, particularly the dispositions on trusts for sale contained in L.P.A. 1925, ss. 23-33, or had he given any weight to the fact that Lord Birkenhead's advisers could not conceivably have contemplated enacting the innovation he attributed to them, he might have stayed his destructive hand. It can be said of him that, with several alternatives before him, he selected that which is not the happiest. But harsher language could be used of a draftsman who sprang upon the judiciary a word of no established legal significance and tolerant of several diverse meanings.

P. A. D.

BOOK REVIEWS.

A Digest of the Law of England with reference to the Conflict of Laws.

By the late A. V. DICEY, K.C., formerly Vinerian Professor of English Law in the University of Oxford. Fourth edition. By A. BERRIEDALE KEITH, D.C.L., D.Litt., of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1927. pp. cxxiv, 1056. £2 12s. 6d. net.

One of the most important developments of English law during the nineteenth and twentieth centuries has been the growth of a body of rules on the conflict of laws. On this branch of English law, which is almost wholly the result of judicial legislation, the works of two eminent jurists of our time have already taken their place among the classics of legal literature. Westlake's *Private International Law*, the first edition of which appeared in 1858, was a pioneer work which, in its several editions, has continuously influenced the progressive development of the law. The second of these two works, Dicey's *Conflict of Laws*, first made its appearance in 1898. "To no single English writer," remarked Dicey in his preface, "am I more deeply indebted than to Mr. Westlake" (see also Dicey's appreciation of Westlake's book in *Memories of John Westlake*, 1914, pp. 17-42). In 1896, when, in his own words, Dicey was still "sticking tight" to the preparation of his first edition, he wrote to Bryce: "What a queer thing life is. Why should I ever have become involved in this conflict of laws?" (see *Memorials of Albert Venn Dicey*, edited by Robert S. Rait, 1925, pp. 125, 140). One reason why he became involved in the study of this growing and complex branch of English law, one may assert with confidence, is because it exactly suited his robust mind and legal genius. His book, later editions of which have appeared in 1908, 1922, and 1927, is not only evidence of his complete mastery of the subject, it is also a striking illustration of his remarkable power to express legal rules and concepts in precise and lucid English. Dicey owed much to jurists other than Westlake; he owed not a little, for example, to Story and Savigny. But by far the greater part of his work is due to his own research and thought; and, even if he had not thrown a flood of light on the law of the constitution and written a remarkable book on law and public opinion, this one work on the conflict of laws would entitle him to a secure place beside Blackstone and other great creative writers on English law. In the words of Geldart, his immediate successor in the Vinerian chair, he "has not only reduced to order one of the most intricate and technical branches

of our law, and illumined it with an unrivalled wealth of comment and illustration, but he has exerted a potent influence on its development " (see *op. cit.*, p. 126).

It is fitting that Dr. Keith should be the editor of the fourth edition of Dicey's masterpiece. As Dicey expressed it, Dr. Keith's " extensive knowledge of colonial law " was of much assistance in the preparation of the second edition (1908); while he shared with Dicey himself the joint editorship of the third edition (1922). Indeed, as Dicey's biographer, Professor Rait, has said, without Dr. Keith's help, the author, in the last year of his long life, " could not have undertaken so laborious a task " (*op. cit.*, p. 206). Apart, however, from his long association with the work, Dr. Keith's own studies of the law and constitution of the several parts of the Imperial Commonwealth had well prepared him for the labour of revising Dicey's book and bringing it into line with existing legal conditions. Dr. Keith's painstaking and scholarly attention to his difficult task deserves much more than a passing notice. It must suffice to remark, however, that the new edition is fully in keeping with Dicey's high standards of workmanship. In Dr. Keith's own words, " it rests, like the earlier editions, on the principle of the full acceptance of judicial authority whenever it exists, and on the restriction of personal opinions within the narrowest possible limits." Moreover, it presents fully " the grounds for any opinion adopted where conflict of judicial views or absence of authority has rendered it necessary to form an independent judgment."

The world has been in a state of flux during the five years since the appearance of the third edition; and these changing political and legal conditions have left their mark on the rules in regard to the conflict of laws. International agreements and constitutional changes, as well as legislative enactments and judicial decisions, have modified the law in a number of important particulars; and some of these modifications and the problems which they raise are mentioned briefly in the learned editor's preface. Thus, for example, the Treaty of Lausanne, as carried out by British legislation, raises " a novel and complex problem "; while the creation of the Irish Free State, since the legislatures of Great Britain and the Free State have failed to clear up the legal relations arising from the separation, has resulted in " a complete divergence of opinion " between the courts of the two countries. These and many other features of recent development have led to changes in the text of the book; and they have been introduced with great care and precision. Some of the most interesting of these changes are due to recent decisions; as, for example, *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, on divorce jurisdiction, *Mitford v. Mitford*, [1923] P. 13, on jurisdiction to declare the nullity of marriage, *In re Lorillard*, [1922] 2 Ch. (C.A.) 638, on jurisdiction with regard to succession to property, and *The Fagernes*, [1926] 42 T.L.R. 621, on jurisdiction in respect of territorial waters. Special mention may be made of *In re Annesley*; *Davidson v. Annesley*, [1926] 42

T.L.R. 584, and of *Bartlett v. Bartlett*, [1925] A.C. 377. Dr. Keith deals fully with the first of these two cases as authority to prove that *renvoi* is definitely held to be part of the law of England (see pp. vii, 555, 811-825); while he also shows that in the second case "the Privy Council has once more acted without question on the doctrine [of *renvoi*] in its application to the jurisdiction of the British Courts in Egypt" (see pp. vii, 71, 72, 83, 564, 746, 752, 757, 813, 823, 934-936). The "Introduction" (pp. 1-55), which "forms an integral part of the work" (p. 1), stands substantially as in earlier editions. Since Dicey's true aim in writing the Introduction (see pp. 54, 55) was different from Professor Pillet's conception of it, namely, "propositions advanced as an effort to enunciate the principles on which a system of the Conflict of Laws can be, or should be, constructed" (see p. ix), Dr. Keith has made no attempt to deal with Professor Pillet's criticisms.

H. D. H.

The Jurisprudence of Holland. By HUGO GROTIUS. The Text translated with brief notes and a Commentary by R. W. LEE, D.C.L., Rhodes Professor of Roman-Dutch Law, Fellow of All Souls College, Oxford. Vol. I: Text, Translation and Notes. Oxford University Press. 1926. pp. xxv, 531. 14s. net.

The famous Dutch school of jurists, which, during the seventeenth and eighteenth centuries, exercised so potent an influence on legal thought and development throughout Europe, had its beginnings in the sixteenth century. It owed much to the teachings of Spanish jurists and the French legal humanists; but, in several directions, it made an original contribution of its own to the science of law. Hugo Grotius was, in many respects, the greatest of the Dutch jurists of this epoch. Not only did he lay the foundations of modern international law, but, by abandoning Gratian's identification of the law of nature with Divine Law, and by basing natural law on human nature and reason, he inaugurated a new period in the history of the influence of the principles of natural justice on positive law, both public and private. Moreover, in an age when nationalism was a leading factor in the legal development of all parts of Europe, Grotius was the foremost of the Dutch national jurists. His celebrated work on the Roman-Dutch Law of his country, the *Inleiding tot de Hollandsche Rechts-gellertheyd*, which was written during the years 1619 to 1621, while he was imprisoned in the Castle of Loevestein, was founded on a combination of the Romanic rules and principles which had been received in the Netherlands, the customary and local laws of Germanic origin, and the other native sources. As a literary exposition of the Dutch jurisprudence of his time, Grotius' book at once took rank as a classic. It exercised a powerful influence on the future growth of Roman-Dutch

Law not only in the country of its origin, but also in outlying parts of the Dutch colonial empire. Portions of that empire are now comprised within the British Imperial Commonwealth; and in some of these regions, especially South Africa and Ceylon, the Roman-Dutch Law, although modified by English and other legal influences, is still administered.

Owing to the circumstance that the Roman-Dutch Law is a living system it forms an important part of the curriculum of many of the law schools of the Commonwealth. More particularly in recent years there has been awakened in England a keener interest in its history and principles; and at Oxford and Cambridge, as well as in other schools of law, it is now taught, especially to students from South Africa, as one of the subjects of examinations in law. At the head of the Roman-Dutch school at Oxford stands Professor R. W. Lee; while at Cambridge Dr. D. T. Oliver, the Monro Lecturer, occupies a similar position. Each of these teachers has done much to foster and develop studies in one of the most interesting systems of justice known to legal history. Professor Lee's *Introduction to Roman-Dutch Law* has already taken its place as one of our leading text-books; and his edition of Grotius' work, the first volume of which has now made its appearance will be welcomed by all—students, teachers, practitioners, and judges alike—who have to do either with the historical development or with the practical application of the system expounded by the great jurist. The *Inleiding* is a treatise on private law. As Professor Lee reminds us, "Grotius entertained the project which, however, he never carried into effect, of supplementing it with a treatise on public law" (p. 518). But, within its scope, the *Inleiding* is a comprehensive exposition of the law; and, in the present scholarly edition, it will prove to be, it is believed, one of the most useful of all the books available to students of the comparative legal history of Europe in the early part of the seventeenth century.

In the course of time many editions and translations of Grotius' work, as well as systematic commentaries on its text, have been published; and the work has also inspired the writing of independent treatises, including that of Simon van Leeuwen (1664), on the Dutch system of law. Although the *Inleiding* has been previously translated into English on two occasions, by Charles Herbert in 1845 and more lately by Sir Andries F. S. Maasdrorp, Professor Lee's translation supplies a real and pressing need; for Herbert's translation is now a rare book, while that of Sir Andries Maasdrorp is also out of print.

In Professor Lee's edition, now under review, the Dutch text follows in general that of the second edition (1631), which corrects some of the errors which had crept into the first; while opposite the text will be found an excellent English translation of the original. Grotius' text is not in every particular free from doubt; in fact, as Professor Lee remarks, "it remains far from satisfactory." The editor's learned notes (pp 515-523), which deal with textual, historical, and linguistic problems, are, therefore, welcome; and, since in their preparation he has

relied on the best authorities, such as the writings of Fockema-Andree, and on his own intimate and accurate knowledge of the subject-matter, they are notes to be trusted. The reader will be glad to see the frontispiece, the first reproduction of Alexander Cooper's miniature of Grotius, which was executed, in oil colour on copper, about the year 1635. Also of interest are the tables, compiled by Grotius himself, which are placed at the end of the book; they have been photographically reproduced from the first edition.

Professor Lee has reserved for a second volume his own commentary on the text of Grotius; and in this he will, as he tells us, "make full use of Van der Keessel's *Dictata* and other expositions of the old law." One gladly associates himself with Dr. Oliver, who, in his review of the present volume (see "*Law Quarterly Review*," October, 1926), expresses the "hope that the publication of the Commentary will not be long delayed."

H. D. H.

The Reform of the Land Law: An Historical Retrospect. Being a Public Lecture delivered to the Department of Legal Studies of the University of Birmingham on March 3, 1926. By Professor W. S. HOLDSWORTH, K.C., D.C.L., F.B.A., Vinerian Professor of English Law in the University of Oxford. (Reprint from the *Law Quarterly Review*, April, 1926.) Stevens & Sons, Ltd. 1926. pp. 26. 2s. net.

The key-note of Dr. Holdsworth's valuable lecture is expressed in these words: "It is sometimes supposed that, till the legislation of the nineteenth century, the land law had never, to any great extent, attracted the attention of the Legislature. But I hope to show that this is a mistake. . . . The truth is that the land law, like other branches of English law, has from time to time been reformed by the Legislature; and these reforms have been the starting point, as doubtless these new Property Acts [of 1922-25] will be the starting point, of new bodies of technical doctrine."

Taking this broad view of his subject, Dr. Holdsworth sketches the history of the legislative reform of the land law during six main periods. After a brief consideration of the constructive legislation of the reign of Edward I, he passes to the Tudor and Restoration periods, the period immediately after the Reform Act of 1832, and the last half of the nineteenth century; while towards the end of the lecture he touches upon the post-war movement for reform which resulted in the Property Legislation of 1922-25. He shows us how, in each of those periods, changes in the economic and political conditions of the country necessitated the changes in the land law introduced by Parliament; he explains the effect of these changes on the later law; he gives, in fact, an illumin-

ating account of the historical foundations of the new system of law embodied in the recent Acts.

As a result of his study of the long history of the land law Dr. Holdsworth finds that there have been certain main tendencies in legislative reform. "In the first place," he remarks, "contrary to the usually received opinion, the Legislature has had a larger share in shaping the land law than it has had in shaping any other branch of private law;" and, again, "the tendency which Maitland discerned in the law of the thirteenth century, to make what was formerly the law for the great men the law for all, is also discernible all through its history." These hints as to the general features of legislature reform, from Edward I's day to our own, are illuminating; and, indeed, all parts of the lecture are valuable as showing us that the new Property Legislation must be studied in its historical setting. Dr Holdsworth maintains, rightly, that "some five centuries of law reformers have contributed" to our new property law. Historically the recent Acts are "the product of a long series of reforming statutes; and their provisions are a striking illustration of the continuity of the history of the legislative reform of the land law." In the words of Sir Leslie Scott, the new Acts are "not revolution, but evolution."

In truth, Dr. Holdsworth's study is proof, if proof were needed, that the new Property Acts can be understood only in the light afforded by the long history of our law. Even the statutory changes in the land law made by Edward I six centuries ago, are, to employ Dr. Holdsworth's words, "still apparent in the new Acts." That the recent legislation of Parliament has not broken away from the past, in a revolutionary way, is being more clearly recognised by property lawyers every day; but, for the benefit of those who still foolishly imagine that the history of our law of property is no longer important, the lesson taught by the Vinerian Professor still needs to be emphasised.

Dr. Holdsworth's lecture stimulates thought in several other directions. It provokes curiosity, for example, as to the true solution of an interesting, but difficult, problem concerning Roman influence on the English law of property in the thirteenth and sixteenth centuries. One wishes that the learned lecturer had brought it within the compass of his discourse.

The problem may be stated briefly. The sharp division of the law of property into two parts or branches—the law of land and the law of chattels, or, to express it in other terms, the law of immovables and the law of movables—is Germanic, not Roman. This fundamental distinction, which has been characteristic of all bodies of Germanic law, was, as Dr. Buckland has remarked, of "only secondary interest in Roman Law" (*Text Book of Roman Law*, p. 188); for in the Roman system, or at least in that of the time of the classical jurists, there was, speaking generally, only one body of property law, its rules being applicable to land and movables alike. In the words of Dernburg, one of the greatest Romanists of our day, "das römische Recht unterwirft im wesentlichen Grundstücke und bewegliche Sachen denselben Vorschriften" (*Das*

bürgerliche Recht, Vol. III, 1904, p. 9). Only when Germanic law has yielded to Roman influence has it departed, to any material extent, from its basic division of the law of property into two main parts; and in this respect English law was fundamentally Germanic prior to the sixteenth century. German medieval law preserved the distinction tenaciously. As Gierke, when speaking of *unbewegliche* and *bewegliche* things, states: Diese Einteilung bedeutete für das ältere deutsche Recht einen tief angelegten Gegensatz, der das Sachenrecht vom Fundamente bis zum Giebel spaltete und in das Vertragsrecht, Familien recht, Erbrecht und Prozessrecht hinübergriff." Only in the age of the Reception of Roman Law was this marked separation of the German law of property into two divisions partially abandoned. The particularistic legal systems within Germany clung firmly, however, to the contrast; and from them it ultimately passed into the great Civil Code of 1900, a result which Gierke has characterised as a "triumphant progress of Germanic ideas" (see Gierke, *Deutsches Privatrecht*, Vol. II, 1905, pp. 5-19; Hübner, *History of Germanic Private Law*, English translation, Boston, 1918, pp. 164-169).

Although Huebner remarks that "the English law has preserved to the present day the old Germanic view, and among all the legal systems of western Europe has developed it most inflexibly" (*Op. cit.*, p. 165), it emerges nevertheless from the recent researches of Dr. Holdsworth and other scholars that, from the sixteenth century onwards, there has been in England a reciprocal influence of the law of real property and the law of personal property upon each other; and that, in fact, in the course of this development the two bodies of property law have tended to coalesce into one. The recent legislation, which is the culmination of this process, "puts," in Mr. Cheshire's words, "the two forms of property as nearly as possible upon the same footing;" and in this work of assimilation the law of personal property becomes the "dominating system" (*Modern Law of Real Property*, 1925, p. 7).

The distinction between the law of immovables and the law of movables is, however, not exactly the same distinction as the one between the law of real property and the law of personal property. At the present day "chattels real," for example, are for some purposes usually included among the immovables, as one may see by reading Dicey's *Conflict of Laws*, (ed. Keith, 1927); and a long history lies back of this feature, as well as of other similar characteristics, of our property law. When, therefore, we survey the history of English law, for the purpose of determining whether Roman doctrine has modified early Germanic distinctions between immovables and movables, we must have our eyes fixed, at the same time, on the problem raised by the English legal differences between realty and personalty. The historical investigator may easily reach false conclusions if he treats this aspect of his problem as unimportant.

From the early days of the Christianisation of Britain to our own time English law has been continuously influenced, in varying degrees during different periods, by Romanic ideas and doctrines. In the

history of the influence of Roman and Canon Law on British Law there are, however, two chief periods to consider. In the age of the medieval revival of legal studies at Bologna, when Europe was under the influence of the "Lesser Renaissance," Romanic Law spread to many countries, including England: Bracton's treatise is one of the evidences that England did not fall outside the scope of this world movement. The second chief period is the sixteenth century: and in this century of Renaissance, Reformation, and Reception, a time when the Western world was passing from medieval to modern conditions, Romanic legal influences affected the law and the legal thought of England as well as of other European countries. The questions, therefore, which one would like to have answered, by Dr. Holdsworth or by some other scholar, are these: Are the beginnings of the tendency of the "law of immovables" and the "law of movables," or of the "law of real property" and the "law of personal property," to become more and more like each other, to merge themselves in one body of common principles—are the beginnings of this long English process, which is not yet complete, due to the influence, direct or indirect, of the Roman Law? Does this process begin in the medieval epoch of Bolognese studies of Roman and Canon Law; or does it have its origin in the sixteenth century, the age when there was a second renaissance of Romanic law throughout Europe?

Suggestions as to the solution of this problem will be found in the literature of our legal history. Maitland, for example, speaks of the tendency of Glanvill and Bracton, due, possibly, to the influence of Roman legal doctrine, to view immovables and movables as subject, in many respects, to one and the same set of rules (see *History of English Law*, 2nd ed., 1898, Vol. II, p. 2); while Vinogradoff, in dealing with the English distinction between real and personal property, and in seeking for its origin in the teaching of Roman lawyers on actions, appears to overlook the historical significance of the early Germanic distinction in England between immovables and movables (see "Zur Geschichte der englischen Klassifikation der Vermögensarten," *Festschrift für Brunner*, 1910, pp. 573-577; *Roman Law in Mediæval Europe*, 1909, pp. 101, 102).

It is well-known that at different stages of its long history the English law of property has been influenced, in certain particulars, by Roman doctrine (see, e.g., Holdsworth, *History of English Law*, Vol. VII). Up to the present, however, no definite and satisfactory solution has ever been given to the fundamental and fascinating historical problem which the gradual assimilation of real and personal property suggests. Has that assimilation been due to the reception of Roman principles; or has it been caused by non-Roman, purely English, factors in our legal development? A firm answer to this question, an answer based on scholarly research in comparative legal history, would be enlightening to all who study the new Property Legislation in its theoretical and historical aspects.

H. D. H.

Carson's Real Property Statutes. Third edition. By H. W. LAW, M.A., Barrister-at-Law. 1927. Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. pp. cxxviii, 1363. £4 net.

The subject-matter of the book before us was recast as occasion offered by the late T. H. Carson, K.C., and in 1902 his name was formally and very properly substituted on the title page for that of his predecessor. While the edition of 1927 therefore appears as the third of Carson's Real Property Statutes *eo nomine*, it is in fact no less than the twelfth in line from the stock of descent created by Shelford in 1833. It would be gratuitous here to speak of the general merits of a work which has for so long been part and parcel of the property lawyer's equipment. At the hands of Mr. Carson it only acquired further distinction. Particularly in the regions of Prescription and Limitation Mr. Carson's learning raised it to the rank of a pre-eminent authority. In what follows we shall limit ourselves to a consideration of Mr. Law's labours in bringing the whole up to date.

The present editor takes up the book as Mr. Carson and Mr. Bompas left it as long ago as 1910, containing pp. cx and 951. The new edition runs to pp. cxxviii and 1363. Space has been saved by the omission of the obsolete Debts Recovery Acts, Lord Cranworth's Act, 1860, the Partition Acts and the Settled Estates Act, 1877, and by a judicious pruning of the notes to the Inheritance and Dower Acts. Against this must be set off the adoption of a slightly larger type (for which relief much thanks). The bulk of the additional 430 pages is attributable to the incorporation of the Statutes of 1925.

This incorporation is, of course, the crux of Mr. Law's task. He is faced with a body of legislative reform more than comparable in mass and penetration with that which in the fourth decade of the last century provoked the original "Shelford." We have two main criticisms to offer on the way in which Mr. Law has discharged his difficult duty. First, some 96 pages of large type are taken up almost exclusively by the text of the Land Registration Act, 1925, whereas the Land Transfer Act of 1875 and Parts II and III of that of 1897 found no place in previous editions. The notes on the Act are scanty, and the *rules* are not included. We regard this as a mistake of policy. The Land Registration Act divorced from the rules made thereunder in November, 1925, is as Hamlet without the Prince of Denmark; while—to take one example of many—Section 41 of the Statute calls for a good note and cross references. A problem in transmission of registered land confronts us in the apparent fact that a deceased person on the register is deemed to remain legal owner pending the registration of either the personal representative or the beneficial devolute. We think Mr. Law would have been better advised either to conform to his predecessor's policy by leaving the entire field of registered title to Brickdale and Stewart-Wallace, or to print the Act with the statutory rules and fuller notes. We prefer

the latter alternative. The present scheme seems to us rather a waste of space where space is precious.

Secondly, we apply similar criticisms, although in a less degree, to the learned editor's treatment of the Law of Property, Settled Land, and Administration of Estates Acts. For example, Sections 10 to 14 of the last named statute have been replaced by sections of the Judicature Act, 1925. Mr. Law merely summarises the substituted provisions in a note at page 481, where, we think, he ought rather to have reproduced them at length with full comment. His bare reference to *Re Herbert's Estate* [1926] p. 109 cannot compensate for the absence of adequate guidance on the vexed question of the circumstances in which a single administrator can make a satisfactory title to land. And so with the notes to the new legislation generally. *Pace* the admirable Law Notes and Chitty's Statutes, the profession has not thus far received the benefit of much detailed annotation of the Acts except from the draughtsmen thereof. Mr. Law could have given us a detached view on several points of difficulty. It is matter for real regret that he has been too modest even to allude to many of them. Thus the effect of a power as opposed to a trust for sale might have been noted with advantage under one or other of Sections 23 to 32 of the Law of Property Act and cross referenced with Section 30 of the Settled Land Act. *Darlington v. Darlington*, 1926 W.N. 192, might, perhaps, have been mentioned as interpretative of the words "persons interested" within the meaning of the Law of Property Act, Schedule I, Part IV, Paragraph 1 (11).

The foregoing remarks must not be taken to imply that the present editor has not produced an extremely painstaking and valuable edition. His work shows all the accuracy to be expected from one trained in Mr. Carson's chambers: and caution in commenting on the new Acts is a fault on the right side. The supremacy of the notes devoted to Prescription and Limitation is fully maintained. To say of the book as a whole that it has not suffered by editing is the highest praise, and we gratefully make this acknowledgment to Mr. Law.

H. E. S.

Wolstenholme and Cherry's Conveyancing Statutes. 11th edition.

By SIR B. L. CHERRY, LL.B., J. CHADWICK, M.A., LL.B., and
J. R. P. MAXWELL, Barristers-at-Law. Two Volumes. £4 net.
Stevens & Sons, Ltd. Vol. I, 1925. pp. cvii, 611, 191.

When the last issue of this Journal was preparing for the press in April, 1926, it was decided to defer the review of the above work until the promised second volume should be forthcoming "as soon as possible after the new rules and orders were settled." Volume II has not yet been published, and we must, therefore, give some notice of

the book at the stage it has reached. We do not for a moment cavil at the delay in the appearance of the second half. It would, of course, be a convenience to have the draftsman's notes and cross references on the Settled Land Act, Trustee Act and Administration of Estates Act of 1925 in addition to those on the Law of Property Acts, 1922, 1924 and 1925, and the Land Charges Act, 1925, now in our hands. But the legal profession and the public have already drawn heavily on the services of Sir Benjamin Cherry, and it is only fair that one who has borne the brunt of drafting the new Acts, expounding them by lecture, and producing an enlarged and revolutionary edition of *Prideaux'* precedents based upon them, should have a little leisure in settling what must necessarily be their leading and responsible interpretation. Any commentary on the portentous legislation of 1925 requires the utmost consideration if it is to maintain the standard set by *Wolstenholme's* labours on the earlier Statutes. Having regard to the wide and novel field to be covered, it might, indeed, be said with greater justice that Volume I was precipitate than that Volume II is tardy.

While Sir Benjamin Cherry has seized the occasion to give us at all possible points the best of the learning in previous editions, the volume before us is necessarily to a great extent original work. We have here, in fact, the first instalment of the principal draftsman's commentary on his handiwork, and it goes without saying that lawyers find themselves immeasurably indebted to the learned commentator and his associates. "For ten years," runs the preface, "the conveyancing members of the legal profession will be on their trial." It is a solemn thought. It will lead the great majority of conveyancers imbued with the old practice to look to this book as to a *tabula in naufragio*: and the raft in its turn is on trial. That it will prove fairly seaworthy is manifest from a perusal and frequent consultation of Volume I.

Pp. lv to cvii are devoted to a summary of the new Acts. As might be expected, no man can compete with the author in making a comprehensive survey of the Acts and their interdependent provisions. We have nothing but respect for the bold lines of the map. That, however, must not deter us from remarking that its execution in detail is far from perfect. This introduction bears too many marks of hasty preparation and revision. At p. lvi we notice "devise" for "device," at p. lxxvi "L.C.A. 1922" for "L.C.A. 1925." The punctuation is irritatingly bad, for example, at p. lxxviii, paragraph 5. At p. lxxxix occurs a sentence which might have been composed in a nightmare: "As regards a legal estate, the petition (*sc.* in bankruptcy, *Ed.*) does not, unless registered as a pending action, give notice to a purchaser for money's worth (without extraneous notice of an act of bankruptcy) of the bankruptcy, unless registered as a pending action: S. 3 (1) (2)." At times the blemishes extend beyond mere style, and undue compression combined with lack of examples leads to obscurity. At pp. lxx and lxxi we are not much enlightened on the "enforcement, priority and manner of giving legal effect to equitable

interests." "In proper cases," we are told, "legal estates will be created in priority to the trust for sale." The reader seeks anxiously but vainly to know what exactly are these proper cases. The paragraph at p. xci on "overreaching or defeating provisions" strikes us as muddled and elusive. We do not understand the remark at p. xc, "'Equitable easements,' *i.e.*, an easement created for less than a fee simple or a term of years absolute, after the commencement of the act, *such as a personal license . . .*." We cannot but regret these blots on a finely conceived introduction.

The notes to the text of the Law of Property Acts and the Land Charges Act are lucid and helpful. It is a little difficult to dissociate criticism of the annotations from criticism of the statutes themselves, but we would respectfully offer the following suggestions. First, the curious language of 13 Eliz. c. 5 is adopted with modifications and additions in L.P.A. Section 172. We think the reader is entitled to have his attention specially drawn to the unhappy phrasing of Sub-sec. (3) in relation to Sub-sec. (1). Secondly, the mysteries of the overreaching machinery in L.P.A. Sec. 2 are not solved by the notes to that Section, even when read in conjunction with introductory remarks at pp. lxii-lxiii, lxvi-lxix, and 127. There ought to be a note to L.P.A. Sec. 2 (1) (ii) "or independently of that sub-section", referring the reader to L.P.A. Sec. 28 and thence to S.L.A. Sec. 72, and comparing the normal overreaching powers of trustees for sale thus arrived at with those of *ad hoc* trustees for sale under L.P.A. Sec. 2 (2) and (3). The comparison would be illuminating. Speaking generally, the structure of the new Acts obliges a commentator to resort to endless cross references, and we could wish thirdly for a correlating note between L.P.A. Sec. 44 (5) and L.P.A. Sec. 199 (2). The disappearance of the doctrine of *Patman v. Harland*, 17 Ch. D. 353, *prima facie* reveals the position that, if prior to 1926 A sells part of his land to B and takes restrictive covenants from B, and after 1925 B leases to C without giving C actual notice of the covenants, A cannot enforce those covenants against C: for C has no actual notice; he is not affected by constructive notice; and the covenants (being created prior to 1926) are not registrable as land charges. Presumably L.P.A. Sec. 199 (2) stops up this gap. But the comments in the new Wolstenholme, at p. 203 on Sec. 44 (5), and those at pp. 466-8 on Sec. 199, are equally silent on the point. Fourthly, we should have liked to see fuller notice given to the distinction between trusts for sale and powers of sale than appears at pp. lxxxviii and 177. The notes are apparently silent on the fate of certain active trusts of land where there is no trust for or power of sale. Fifthly, we would welcome comment on the problem raised by the loose wording of L.P.A., Schedule I, Part IV, paragraph 1 (1). Do the final words "rights and powers for the purposes of administration" include power to assent to the vesting of the land in the first four beneficiaries upon trust for sale, or are they limited to rights and powers of administration in the narrower sense of paying debts, duties, etc?

There are, of course, numerous difficulties of construction which cannot be anticipated in the first edition following the enactments. Upon the whole Volume I of the new Wolstenholme constitutes a valuable commentary. Its utility will be very greatly increased when the second volume appears, incorporating, no doubt, the amending Act of 1926 and a wealth of carefully considered notes.

H. E. S.

Prideaux' Forms and Precedents in Conveyancing. 22nd edition.

By SIR B. L. CHERRY, LL.B., and J. R. P. MAXWELL, of Lincoln's Inn, Barristers-at-Law. In 3 Volumes. Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. 1926. Vol. I, pp. lxxxiv, 1036; Vol. II, pp. lxiv, 703; Vol. III, pp. cxlviii, 1390. £6 6s. net.

The learned editors rightly claim at the beginning of their preface that this is an epoch-making edition. *Prideaux'* precedents have had faithful followers for generations, and the task of adapting them for use under Lord Birkenhead's Acts is a grave responsibility. That the undertaking has been so promptly fulfilled is a matter for congratulation and thanks from conveyancers to Sir Benjamin Cherry and Mr. Maxwell.

The editors have expanded some two thousand pages in two volumes to over three thousand pages in three volumes, and have omitted nothing which could assist the draftsman in grappling with his task under revolutionary conditions. The new *Prideaux* is a weapon of heavy calibre in the conveyancer's armoury. We gratefully acknowledge the immense and effective labours which have been spent upon it.

If we may take the invitation offered at p. vi of the preface to make "suggestions or comments which may be of service in the preparation of a new edition," we would draw attention to four points which occur to us. First, the case of *Bates v. Kesterton* [1896] 1 Ch. 159 is not apposite in the context in which it is cited at I. 590. Secondly, we should like to see in the next edition a wider choice of investment clauses than the third volume now offers. Thirdly, we notice midway down I. 368 restrictive easements for restrictive covenants. Fourthly, in I. 462, at the close of paragraph (1), "said extinguishment" should read "extinguishment of all and every such incident and right of the lord."

H. E. S.

Strahan's Concise Introduction to Conveyancing. Third edition. By L. B. TILLARD, of the Inner Temple, Barrister-at-Law, Tutor to the Law Society. Butterworth & Co. 1927. 8vo., pp. xxiii, 435. £1 1s. net.

Messrs. Butterworth are to be congratulated on having produced this new edition in so attractive a form, and on having secured Mr. Tillard as its editor. Candidates for examinations in Conveyancing could not do better than read this book after Mr. Cheshire's work on Real Property or Professor Eastwood's edition of Williams.

The book contains as a foreword Sir Arthur Underhill's well-known essay on the simplification of the law of Real Property. As the essay is now some years old it would be desirable, if it is reprinted in the next edition, that the date of its original publication should be stated.

The editor's introduction contains a brief comment on the effect which the 1925 Acts have had upon the doctrine of notice. This topic is the subject of a great deal of confusion of thought, and stands in urgent need of a good monograph. The editor's remarks show that he is the man to write it.

It is a pity that Chapter 2, Contract of Sale, is compressed into fourteen pages. This is an inadequate allowance in a book which contains over five hundred. The result is often obscurity which may weary the reader. Page 60 is particularly open to criticism in this respect, and contains also illustrations of the fact that style is not the strong point of the work.

Another topic which receives far too brief treatment is that dealt with by sections 137 and 138 of the Law of Property Act, 1925, which make the Rule in *Dearle v. Hall* applicable to assignments of equitable interests in real property. Surely there ought to be an exposition of this rule in Chapter 9, Assurances of Equitable Interests in Land. Mention of the rule is, in fact, postponed to Chapter 35, which contains only two pages.

We mention these criticisms not because we wish to qualify in any way our recommendation of this edition to students, but because the book is capable of being made still better in the next edition.

H. A. H.

Law Notes Guide to the New Property Statutes. Second edition. By H. G. RIVINGTON, M.A., and A. C. FOUNTAINE. "Law Notes" Publishing Offices, London. 1926. pp. xxxii, 600, 48. £1 5s. net.

The authors of this gallant pioneer lost no time in bringing their work up to date immediately after the enactment of the Law of Property Amendment Act, 1926. The amendments have been incorporated in the text, and the Act has also been set out in full with

explanatory notes. So have the relevant sections of the Judicature Consolidation Act, 1925. The text generally has been revised and expanded in the light of experience and further criticism of the Statutes. Four appendices have been added containing, respectively, reported cases on the Acts, certain practical points discussed in various articles in "Law Notes," "The Hour of Fate," which is an extremely clever Shakespearean burlesque of the Statutes, and orders and rules made under the Acts. This edition deserves even higher praise than the first. It is full of constructive criticism and lucid exposition.

H. E. S.

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- Stephen's Digest of the Criminal Law.* Seventh edition. By SIR HERBERT STEPHEN, Bart., and SIR HARRY LUSHINGTON STEPHEN. Sweet & Maxwell, Ltd. pp. lii, 549. £1 5s. net.
- Paley on Summary Convictions.* Ninth edition, re-written and enlarged. By V. BLANCHARD BATESON. Sweet & Maxwell, Ltd. pp. cii, 1260. £2 2s. net.

These volumes are, each in its own way, a departure from the usual method of treating the subjects with which they are concerned. The law relating to indictable offences, as Dr. Kenny has so ably shown, lends itself to treatment in readable form. This method was eschewed by the late Mr. Justice Stephen, who preferred to outline the law in a series of carefully drafted Articles, the basis, as he may have hoped, of a complete code of the criminal law. It is matter of past regret that the style which enlightened the *History of the Criminal Law* was not to adorn a treatise on the substantive law. It may presently be regretted that in following the manner of digests the learned editors of this edition of Stephen have been prevented from giving the fruits of their extensive experience in the administration of the Criminal Law in a style which assuredly would have been their own.

In following the method of the author, his editors have not found difficult the task of incorporating the results of the purely codifying legislation of this century, namely, the Perjury Act, 1911, and Forgery Act, 1913, and Larceny Act of 1916. The references to these statutes are adequate, but it would be more convenient if in all cases the dates were added to the regnal years, and also the names in the case of the better known statutes. The nomenclature of the Larceny Act, 1916, receives justifiable criticism in an interesting introduction; one need only quote the question: what is the plural of stealing? The book contains an interesting note on the offence of "larceny by trick"—a phrase which did not obtain legal force until it was inserted into the Larceny Act, 1916. But is it right to say that the distinction between false pretences and larceny by a trick "implies no legal difference of

any importance"? An innocent purchaser from a person who had illegally and criminally acquired, say, a motor car would think otherwise if he attached any importance to retaining his purchase. On this point one may refer to the judgment of Lush J. in *Heap v. Motorist Advisory Agency, Ltd.*, 1922, 1 K.B. 577 at p. 583.

On the other hand the work of the magistrates, ranging as it does over such varied territory as Public Health and Poor Rates, Highways and Husband and Wife, Adulteration and Affiliation, is not comfortably amenable either to the form of digest or to that of serial exposition. Some system there must be, and the one usually adopted has been the alphabetical. But in Paley the law and practice affecting courts of summary jurisdiction are given in the form of a logical, readable treatise. The task of shaping the material into this form at the time of the earliest editions a century ago may not have been so formidable; but for the ability and care with which he has moulded the mass available to-day, the learned editor of the Ninth Edition is to be congratulated. The chapters on the prerogative writs as they affect magistrates are clear and helpful; so also are the portions relating to appeals from courts of summary jurisdiction, and the way is plainly outlined whereby an appellant may avoid the dangerous pitfalls dug in his path by stupid and meaningless technicalities. Some matters, e.g., bail, seem to call for ampler and more distinctive treatment.

Neither of these two excellent editions is cumbered with superfluous material, unnecessary notes, or historical diversions; they are comparable in their adequacy. But compare their sizes! It is significant of the change which is coming over the administration of the criminal law. The editors of Stephen have felt constrained to qualify the title of the work by a reference to its limitation to indictable offences, an alteration, as they express it, to suit modern conditions. These conditions continually increase the number and importance of summary and indictable offences of which persons may be found guilty and for which they may suffer serious punishment by loss of property or liberty at the hands of unpaid and legally untrained tribunals. For their guidance it is well that there should be such works as Paley.

R. M. H.

The York-Antwerp Rules : Their History and Development, with comments on the Rules of 1924. By GEORGE RUPERT RUDOLF, Member and Past Chairman of the Association of Average Adjusters; Joint Editor of Lowndes's Law of General Average, 5th and 6th editions. Stevens & Sons, Ltd. 1926. pp. xvi, 320. 15s. net.

The nineteenth and twentieth centuries constitute an important epoch in legal history. It is an epoch characterised by the world-wide readjustment of law to changed social and political conditions and by

the national codification of law in many countries ; and it is also notable by reason of the movement for the international assimilation and unification of law, more particularly its commercial and maritime branches. In the history of this last movement the York-Antwerp Rules hold a prominent place.

Professor Wigmore, who has observed that " the methods of unification and of concert must vary, according to what is most feasible in each separate part of the field [of the law] " (see *The Progress of Continental Law in the Nineteenth Century*, by various authors, Boston, 1918, a volume in the " Continental Legal History Series," p. 538), mentions four methods which have been put into practice, namely, (1) uniform usage of individual parties or groups, by voluntary agreement, (2) uniform national law, by voluntary national legislation, (3) uniform international law and administration, (4) uniform national rules for the conflict of laws. The most striking example of the first method, Dr. Wigmore declares, is furnished by the York-Antwerp Rules for Maritime General Average, which came into use by voluntary practice in the contracts of freighters, after a generation of fruitless attempts to agree upon an international treaty. To-day these rules are universally observed, without apparently " having the legislative support of a single nation " (*op. cit.*, p. 540). As Mr. Rudolf remarks in *The York-Antwerp Rules*, the work now under review, " the growing tendency has been for many years to introduce by agreement into the contract of affreightment a clause providing for the adjustment of general average according to York-Antwerp Rules, thereby substituting for the particular national law concerned an agreed " code " of rules dealing with many practical examples of what is or is not to be regarded as general average, the method of calculating the allowance and the basis for contribution " (*op. cit.*, p. v).

The last step in this remarkable progress towards uniformity in maritime law was taken in 1924, at the Stockholm Conference of the International Law Association, when there were introduced into the York-Antwerp Rules a number of preparatory clauses defining the general principles of the subject. The Rules of 1924 are thus made to cover the whole ground theoretically ; and they have been approved by many of the leading commercial and maritime bodies of the world.

Since Mr. Rudolf was himself associated with the production of these York-Antwerp Rules of 1924, it is appropriate that he should review the movement towards uniformity and give an exposition of the Rules in practice. His book has been prepared with great care ; and it should prove of much value to the profession and the commercial community alike.

After sketching the history of the Rules since the commencement of the movement in 1860 (pp. 1-31) and after referring briefly to the suggested abolition of general average (pp. 32-37), Mr. Rudolf reproduces the text of the Rules of 1924 and comments upon their meaning and their application in practice (pp. 38-135). He concludes that " those most intimately concerned recognise the value of leaving the

equitable principles of General Average undisturbed. His comments on the Rules of 1924 constitute, however, his most important original contribution to the subject; they show us the common interpretation of the Rules, "without which," as he says, "their value cannot be fully realised."

The appendices also contain matter of much usefulness. In them Mr. Rudolf presents comparative tables of the Glasgow Resolutions of 1860, the York Rules of 1864, and the York-Antwerp Rules of 1877, 1890, and 1924 (pp. 136-169); he sets out in tabular form the revision of the York-Antwerp Rules, 1890, suggested by the Association of Average Adjusters in 1924 (pp. 170-178); and he also gives the text of the drafts prepared by committees before the meeting of the International Law Association at Stockholm in 1924 (pp. 179-200). In the remaining appendices Mr. Rudolf presents the answers by various lawyers to questions on the law of general average in their respective countries (pp. 201-270), a collected summary, prepared by his Honour Judge Dowdall, K.C., of the law of general average of several countries (pp. 271-296), and the text of the draft international code relating to general average (pp. 297-309).

H. D. H.

The Practice of the Privy Council in Judicial Matters. Second edition.
By NORMAN BENTWICH. Sweet & Maxwell, Ltd. 1926. pp. xxx,
416. £1 15s. net.

The political events and altered conditions which have followed the Great War have rendered a new edition of this valuable work advisable.

The author very properly appreciates the fact that it is impossible to lead his readers to understand aright the present position of any important factor in our national system unless the subject is approached by means of a historical exposition showing not only its origin as an institution but also the steps by which it has come to be what it is. It is, however, in the historical portions of the book that the present writer has noted a few inaccuracies. In Chapter III we find an ambiguous use of the term Canada to represent the old French colony of Canada proper, and also, without distinction, the popular extension of the term to the Dominion of Canada; nor is it strictly correct to say that the conquest of French Canada took place in 1759. Wolfe's force certainly landed in that year, but the conquest was not complete until the end of 1760. It may be pointed out also, that, although the English Criminal and Civil Law was imposed upon the colony by Royal Proclamation, the old Civil Law, together with a guarantee of religious liberty, was restored ten years later, and still substantially remains in force. In this connection the date in the reference to *Campbell v. Hall* is given as 1779 instead of 1774.

In Chapter XVII it is stated that the various Ecclesiastical Courts of the country were established by Henry VIII (24 Hen. VIII. c. 12), whereas it is a matter of history that the Ecclesiastical Courts of the realm were established by the Charter of Separation of William I. Henry VIII's contribution was the provision of a Court of Delegates; indeed, the Author himself, in a previous chapter, refers to the existence of such courts, where he states that until the Tudor Period appeals were often carried to the Pope.

The specially useful appendices of the original work have been brought up to date and reproduced in the present edition.

Both for the practitioner and for the law student seeking to obtain a thorough working knowledge of the Practice and Procedure of the Judicial Committee this book appears to supply all the essential information.

R. B. H.

Wilshire's Analysis of Williams on Real Property. Fifth edition.

By A. M. WILSHIRE. Sweet & Maxwell, Ltd. 1926. pp. 161.
7s. 6d. net.

This is an extremely well executed epitome of the subject-matter contained in the 24th Edition of Williams on the Law of Real Property, and is thoroughly adapted for use either as an introductory manual or as a book for final revision of the subject as it now stands.

We have noticed a few slips of minor importance in the text; for example, the omission of the word *for* on page 66, line 21; on page 83 *foods* is printed for goods; on page 161 in the last paragraph *by* the court appears for to the court, and on the same page the reference to section 114 is apparently intended for section 82 of the L.R.A., 1925.

R. B. H.

Mews' Digest of English Case Law to the end of 1924. Second edition.

Under the general editorship of SIR A. WOOD RENTON, K.C., and S. E. WILLIAMS, Barrister-at-Law. Vols. VIII-XVI. Sweet & Maxwell, Ltd., Stevens & Sons, Ltd., and the Solicitors' Law Stationery Society, Ltd. 1926. Vol. VIII: Ejectment—Execution, pp. xiv and columns 1668. Vol. IX: Executor—Heir-at-Law, pp. xix and 1682. Vol. X: Highways—Inspectorship,

pp. xv and 1486. Vol. XI: Insurance—Landlord, pp. xv and 1758. Vol. XII: Land Registry—Machinery, pp. xv and 1550. Vol. III: Machinery—Mutual Will, pp. xvi and 1902. Vol. XIV: Name—Poll, pp. xx and 1556. Vol. XV: Poor Law—Prescription, pp. xiv and 1944. Vol. XVI: Press—Receipt, pp. xvi and 1472. Index to Vols., i-xi. Price £1 15s. per vol.

In the last number of this Journal we reviewed at length the scheme and scope of the new Mews, and commented on the early instalments of the work. The expectations we then expressed of succeeding volumes have been thoroughly fulfilled. The get-up and printing of Vols. VIII to XVI maintain the really excellent standard set in Vols. I to VII. The editorial staff has been reinforced from Vol. IX onwards by Mr. Wyndham A. Bewes, Barrister-at-Law. This appointment is a further earnest of the publishers' desire to produce a thorough and satisfactory digest.

In the former notice it was remarked that the real test of the utility of any digest must needs be found in the index. Close on the heels of Vol. XI appears a temporary index to the volumes theretofore issued—a timely and impressive production, which we have found in the course of a frequent use of it to be accurate and complete over the ground it covers.

It is not to be expected that the result of these monumental labours should be free of blemish and inaccuracy. In bringing the following criticisms to the notice of the publishers and editors, the reviewer only wonders that he has found so few.

Vol. X, col. 1130, at four lines from the bottom, reveals a misprinted date. In Vol. XI, col. 1627, we find a serious and misleading omission. *Malzy v. Eicholz*, 32 T.L.R. 152, is digested under that reference without regard to the fact that it was reversed on appeal at p. 506 of the same volume of reports. The error is all the more curious in that the whole proceedings are reported together in [1916] 2 K.B. at p. 308, a reference which we think ought to be preferential if it is not made additional. Again, the case of *Barnes v. City of London Real Property Co.* [1918] 2 Ch. 18 is digested under the sub-title of Express Covenants. It might, and indeed ought, to be noticed also or cross-referenced under Implied Covenants in the same connection as *Malzy's* case. The title Machinery is needlessly reproduced at the beginning of Vol. XIII after being inserted at the close of Vol. XII. *Hulley v. Silversprings Co.* [1922] 2 Ch. 268 is not digested under Easements or Prescription. Incidentally we do not regard as satisfactory the classification of Prescription as one rubric of Easements. *Spencer v. Hemmerde* [1922] A.C. 507 is not to be found in Vol. XII under the title Limitation, or in the temporary index to preceding tomes. Where can it have found a resting-place?

In regard to citations of cases reported in such series as the Law Times, or in the standard reports prior to 1891, the adoption of the practice of adding the date in round brackets would be very welcome.

Since writing this review we have received Vols. XVII to XXI inclusive, at a date which does not leave time for detailed examination before going to press.

H. E. S.

Outlines of Criminal Law. Twelfth edition. By COURTNEY STANHOPE KENNY, LL.D., F.B.A. 1926. Cambridge University Press. 15s. net.

The Criminal Justice Act, 1925. By ALBERT LIECK, Chief Clerk of the Marlborough Street Police Court, and A. C. L. MORRISON, Chief Clerk of the Lambeth Police Court. 1926. Stevens & Sons, Ltd. 6s. net.

The Cambridge Law School may regard it as a matter of legitimate pride that the two greatest text-books on legal subjects for students which have hitherto been written are the production of Cambridge Professors. The present generation of law students probably do not fully appreciate the great advantage they possess in having such books as Professor Kenny's *Outlines of Criminal Law*, and the late Professor Maitland's *Equity*, but to those who commenced their legal studies towards the close of the last century and had to make shift with the text-books then in vogue, these works came as a revelation of the method and style in which law books may be written by masters of the subject. A well-known couplet concerning the roads made by General Wade in the Scottish Highlands in the eighteenth century runs :

" If you had but seen these roads before they were made

You would hold up your hands and bless General Wade " ;

and if the present-day law student will take the trouble to compare Professor Kenny's scholarly work with the older text-books he will be impelled to hold up his hands and bless the author who has made his way so smooth for him. The present edition has been carefully revised, and in some parts re-written. The provisions of the Criminal Justice Act, 1925, and other statutes passed since the appearance of the last edition are duly incorporated or noted in the appropriate places in the text, as also are recent cases bearing on the subject-matter. The foot-notes, which frequently serve as a running commentary on the text, and contain a wealth of illustration and supplementary information, have received considerable additions. These are particularly valuable to the student as a guide to the authorities and literature on the subject, and also contain many of those characteristic touches of humour which mark all Professor Kenny's writings.

Messrs. Lieck and Morrison's work on the Criminal Justice Act, 1925, gives a most useful commentary on the Act, and will be found of great practical utility owing to the extensive experience of the authors in the administration of the police courts. There is an excellent outline of the development of the summary jurisdiction of magistrates in

relation to indictable offences contained in the Introductory Note, and, among many valuable comments on the Act, we should direct the attention of students to the discussion of the defence of coercion in the case of married women appended to sec. 47 (p. 90) which abolished the legal presumption arising in the case of many crimes when committed in the presence of the husband.

D. T. O.

Criminal Procedure. By GORDON C. TOUCHE, M.A., and FREDERIC E. RUEGG, M.A. Stevens & Sons, Ltd. 1926. pp. xv, 123. 6s.

A little book that fills a long felt want. There is not enough of it to be of much use to the practising lawyer, but there is quite enough to break the ice pleasantly for a beginner who is struggling with a Bar examination, and who has not been in chambers. To such an one the ordinary books mean nothing, they are much too detailed, too complicated; and this book will serve a useful purpose in giving him a start.

H. B.

The Criminal Law. Second edition. By HENRY W. DISNEY. Stevens & Sons, Ltd. 1926. pp. xxxii, 284. 10s.

The author purports to give, in two-hundred and eighty-four pages, a useful outline of the Criminal Law, Evidence and Procedure. He has set himself too great a task. A subject can be boiled down into a number of maxims, but that is all they are—maxims—and, although they may mean a great deal to the person who knows the subject, they convey nothing to the beginner, and this book's only hope of being useful is that it may help the beginner.

The classification of crimes is excellent, much better and more logical than that adopted by the majority of writers on Criminal Law, even than that used in those monumental works which set out to cover the subject thoroughly.

H. B.

The Criminal Justice Act, 1925. By R. E. OTTER and G. B. MCCLURE. The Solicitors' Law Stationery Society, Ltd. 1926. pp. xx, 152. 10s.

This kind of book, which takes a new Statute section by section and explains it, is always welcome and useful. The wording of the explanations in this book is somewhat cumbersome in some instances, but one

can usually dig the meaning out of them. The explanations give a useful summary of the old and new law, and, equally useful, they refer one to other works where more detailed information about the old law may be found.

The book is printed in very clear type, and the dates of cases are shown in the table of cases, a useful item, which might be followed with advantage by other publishers.

H. B.

Simpson on the Law and Practice relating to Infants. Fourth edition.
By G. W. KNOWLES, M.A. Sweet & Maxwell, Ltd. 1926.
Large 8vo. pp. lxxviii, 344, 45. £1 12s. 6d. net.

The editor of this well established treatise has had the task of absorbing not only all the material of the Acts of 1925, but also a considerable number of recent cases. As to the new Acts, we think on the whole that the plan adopted by Mr. Knowles is the best one. Mr. Knowles has brought each topic up to date by showing the effect of the new legislation upon it, while at the end of the book there is a short chapter setting out such parts of the Acts as concern the law of infants. Too often, however, we found no more than a bald statement of the new law; and we should have liked rather more comment by the editor on its effects.

Certain cases should have been more carefully considered. A case of the importance of *Stocks v. Wilson* [1923] 2 K.B. 235, should be accorded more than the purely perfunctory notice which it does in fact receive (pages 34 and 76); but *Stocks v. Wilson* fares better than cases like *R. Leslie & Son, Ltd., v. Shiell* [1914] 3 K.B. 607, *Cowern v. Nield* [1912] 2 K.B. 419, and *Roberts v. Gray* [1913] 1 K.B. 520, which do not appear in the book at all. This is more than a trifling omission. Again, on p. 36, *Hamilton v. Vaughan-Sherrin Co.* [1894] 3 Ch. 589, is cited to prove that an infant may require repayment of amounts paid on application for shares or on calls, but there is no mention of the effect of *Steinberg v. Scala (Leeds), Ltd.* [1923] 2 Ch. 452, which virtually overrules the *Hamilton* case. On the whole, however, we think Mr. Knowles has done his work well, and that the new edition will be found very helpful.

E. J. T. G. B.

Cases on the Law of the Constitution. By BEROË A. BICKNELL, of the Middle Temple, Barrister-at-Law. Oxford University Press. 1926. pp. xiv, 215. 7s. 6d. net.

Students of the Law of the Constitution will find this collection of cases a useful supplement to the standard treatises of Anson, Dicey and other writers.

The cases have been arranged under four main headings, namely, Parliament, the Crown, the Subject, and the Empire. No attempt has been made to reproduce the reports of cases *ipsissimis verbis*. Although many short extracts from the judgments, in the authoritative wording of the Reports, have been included, the original material has been in general condensed by the editor. Head notes have been omitted, but nearly all of the groups and sub-groups of cases have been prefaced by brief explanatory notes: and these learned notes constitute the editor's main contribution to the subject. The foot-notes, comparatively few in number, are merely references to decided cases or cross-references to other parts of the book itself. The index to subject-matters and the index of cases will be helpful to the reader.

While this small collection makes no claim to completeness in respect of subject-matter, it contains a fair number of the leading cases. The work of editorship has been accomplished in a scholarly manner. Within the limits of its purpose, as a companion to any one who is beginning the study of the law of the constitution, the book is a welcome addition to the literature of the subject.

H. D. H.

The Students' Statute Law. Seventh edition. By ARTHUR WELDON and H. GIBSON RIVINGTON, M.A., Oxon. London: The "Law Notes" Publishing Offices. 1927. pp. lxxx, 887. £2 5s. net.

The new edition of this well-known and useful collection of statutes on various branches of English law has been prepared with care. Owing to the mass of the new statutory law, the statutes dealing with marine insurance, patents and trade marks have been omitted from the present edition. Space thus gained has been used by the editors for the inclusion of the new Acts, or of important portions of them, such as the Agricultural Holdings Act, 1923, the Law of Property Acts, 1922-1926, the Settled Land Act, 1925, the Trustee Act, 1925, the Administration of Estates Act, 1925, the Land Charges Act, 1925, etc. The editorial notes on the new statutory law will be very helpful to the reader. Reference to the pages of the volume is greatly facilitated by the table of statutes (pp. xlix-liv), the list of statutes by name and with sections (pp. lv-lxxix), and the table of cases (pp. vii-xlvi), the latter of which includes cases decided in 1926. The editors justly remark that "in

view of the numerous trusts for sale created by the new Acts," the sections dealing with them are of "great importance" (p. 211); and the editorial comments on this subject, though brief, are useful. Without mention of other portions of the volume it may be remarked, in general, that in its present form Gibson's *Statute Law* is of much value to students. Many practitioners who have consulted the earlier editions will also welcome this revised collection, which has been brought down to the end of 1926.

Transactions of The Medico-Legal Society for the Session 1925-26.

Edited by G. M. SLOT, M.D., and EVERARD DICKSON, Barrister-at-Law. Cambridge. W. Heffer & Sons, Ltd. 1926. pp. xxiv, 161. 12s. 6d. net.

Messrs. Heffer are becoming so well known for their enterprising and attractive ventures in publishing, that the Medico-Legal Society is fortunate in its association with the firm. The transactions for last session contain some interesting matter, particularly the report on the work of the ninth international prison congress, and the study of the case of John Perry, in 1660 A.D. If the society and the publishers aim at a general sale, we urge them to cut down the matter by a vigorous pruning of the speeches, and by the exclusion of unimportant remarks of members. The transactions would be more attractive to purchasers if the cost and size of the book were reduced.

H. A. H.

Restraint of Trade in English Law. By WILLIAM ALEXANDER SANDERSON, M.A., LL.D. (Melb.). Sweet & Maxwell, Ltd. 1926. pp. xxiv, 208. 15s.

Mr. Sanderson has divided his book into two parts; Part I is entitled "Contracts in Restraint of Trade" and Part II "Combinations in Restraint of Trade." This classification appears somewhat illogical since combinations are generally contracts. In Part I contracts between vendor and purchaser and between master and servant are dealt with in a full, lucid and interesting manner. The facts of many cases on both sides of the line are set out and considered, and the arrangement is good. This part of the book will serve as a useful guide both to practitioner and student. The history of the subject offers one of the best examples of the advantages of a law which has not been confined by a code and which can therefore meet adequately the needs of varying commercial conditions throughout five centuries.

Part II gives a somewhat vague impression. This is, no doubt, due to some extent to the uncertainty of the position in English law. The author has not been able to present any definite principles of law, but has contented himself with giving the history of the subject and the decisions in the more recent cases. It is disappointing to find that the question of the third party's claim for damages resulting from combinations—a question which is still a matter of difficulty notwithstanding the recent decision of the House of Lords in *Sorrell v. Smith*—has been dismissed as belonging “really to the law of conspiracy rather than that relating to restraint of trade.” This deliberate omission renders the book incomplete.

A chapter on the law as to combinations in the British Possessions and in other countries forms an interesting addition. It appears that England and Germany are almost alone in refraining from legislation against combines. It would be interesting to know to what extent such legislation has been found to have practical effect.

B. F. M.

International Law. By L. OPPENHEIM. Vol. II. Fourth edition by ARNOLD D. McNAIR, C.B.E., LL.D. 1926. Longmans. 42s. net.

Oppenheim's book is a classic, and there is a heavy responsibility on its editors to maintain its reputation. The burden is all the weightier since Mr. Roxburgh, the first editor after the author's lamented death, found himself compelled by circumstances to abandon any idea of distinguishing matter of his own from that of Professor Oppenheim. The success with which he accomplished his task has been repeated by Dr. McNair. A training in the English Common Law is a valuable accessory to expertness in International Law, and the learned editor's competence in both systems is so well known that we need not dilate upon it. Everything that he has written upon International Law has a balance and sanity about it that appeal to every reader. No one speaks with more understanding of the Covenant of the League of Nations. He is entirely in sympathy with it, and thoroughly realises the folly of any attempt to interpret it as if it were a highly technical document. Much of the new matter in this edition is naturally occupied with the various modes of settling disputes between nations, and such subjects as Conciliation, the Permanent Court of International Justice, the reduction and limitation of armaments, and war in protection of the Covenant of the League of Nations, are handled with felicity. It is gratifying to find such conciseness on topics which have attracted an enormous mass of literature, including a good deal of nonsense. In dealing with alien enemies and the effect of war on contracts, the editor is on familiar ground which he had reclaimed and cultivated in his *Legal Effects of War*. As to the effect of the recent war on such things as the Declaration of Paris, blockade, contraband, continuous

transportation, Dr. McNair contents himself in the main (perhaps discreetly) with narrating what actually occurred. It may be seriously doubted whether the changed conditions of naval warfare have not made necessary a partial recasting of the law as it stood, or was supposed to stand, in 1914. Two of the provisions of the Declaration of Paris look to some of us more like brittle ornaments than useful articles. But the student must draw his own inferences in questions so highly controversial as these. He will find an abundance of juristic opinions on them. What is disquieting is that governments seem to be drifting along without much effort to get a conference which might reduce the law to some reasonable degree of certainty. And the same applies to some of the weapons of warfare, like gas and submarines. Dr. McNair, who has an excellent note on the former, points out that the Treaty of Washington is still inoperative as to both gas and submarines, owing to lack of the requisite ratifications. The proposed code of Air Warfare Rules probably makes the best of one of the most troublesome subjects in the whole range of the rules of war. It is open to some objections, but most of these would come from critics who could suggest nothing better, or who forget that aerial bombardment has nothing like the accuracy of naval gunnery. The chapter on Neutrality and the League of Nations raises problems of great interest. If a member of the League has committed an "act of war" within the meaning of the covenant, what is the position of other members? The balance of opinion is against the view that they are automatically at war with the offending member. Dr. McNair points out possible courses open to other states, and we see no reason to dissent from his suggestions, except for a reservation as to the view that if A affords passage through its territory to B, C, and D, who are co-operating in protection of the covenant, this involves a declaration of war. It is, no doubt, an act of war, but whether it also implies a state of war may be questioned. Another completely new section is that on war zones. We mention note 2 on p. 505, as characteristic at once of Dr. McNair's industry and of his urbanity in overthrowing an argument in favour of the sinking of the *Lusitania*, which is both specious and mischievous. There is much more that might be said not only of entirely fresh matter, but of the minute revision demanded of any one who edits the work of another. But here, knowing as we do by experience the accuracy of Professor Oppenheim's references, we believe that the editor's work was one of addition and not of correction. We heartily agree that it would have been a mistake to shorten the book by eliminating the bibliographies which head most of the chapters.

Reviewing is not invariably an unmixed pleasure, but we shall reckon ourselves fortunate if Dr. McNair's edition of Vol. I falls to our lot.

P. H. W.

The British Year Book of International Law, 1926. Humphrey
Milford. Oxford University Press. 16s. net.

The standard which has always been set by the editors of this annual is well maintained this year. The volume opens with a contribution by Dr. McNair, who, without being in the least dogmatic, inclines to the opinion that the Council of the League of Nations must be unanimous in requesting the Permanent Court of International Justice for an advisory opinion, except when the opinion is merely on a point of procedure. We are very familiar with Dr. McNair's mode of presenting and discussing any legal problem, and there is none that we admire more, quite apart from the reliability of his conclusions. Professor Brierly discusses the draft code of American International Law. We concur in his friendly warnings about the scheme, and we venture to think that any one bred in the English system of law would take the same view. Sir John Fischer Williams' article on "Sovereignty, Seisin, and the League," may be specially commended to any student for elucidating some puzzling views expressed by the Commission of Three appointed to fulfil the mission entrusted to it under the Treaty of Lausanne. There is not a shadow of doubt as to the accuracy of Professor Pearce Higgins' argument in "Visit, Search, and Detention," that belligerents will in the future assert a right to treat neutral shipping as it was treated in the late war in regard to diversion and detention for search. We have consistently urged that the worst difficulty to be overcome by any future Naval Conference is the *hereditas damnosa* of rules which are largely useless because they have borne, since 1914, no relation to actual facts. Mr. Burns develops the theory that international administration may affect the character of International Law. His appreciation of the value of the League Secretariat throws quite a new light on that institution, and his suggestions are highly stimulating. We learn from Mr. Beckett—though we had never seriously doubted it—that there is no system of Private International Law as a whole recognised by the law of nations as obligatory. More interesting is his able analysis of the contents of Private International Law. This is by no means a jurisprudential demonstration *in vacuo*, for, as Mr. Beckett points out, it is the very first point that must be settled in any conference which meets to codify the topic. The next article is by Mr. Bentwich on a much narrower point—nationality in ex-Turkish territory. The Attorney-General of Palestine has the advantage of greater freedom in expressing his views than his legal brother here. Mr. Hedges probes the judicial basis of arbitration. Dr. Thorneley must pardon us if, even after reading what he has to say on Extraterritoriality, we still confess to a dislike of the phrase with its implied inaccuracy. Sir Frederick Pollock's comments on some decisions of the Permanent Court of International Justice command the respect that is due to a great jurist, who is a firm, but rational, supporter of the tribunal. If we barely mention Mr. Malkin's paper on Reservations to Multilateral Conventions, and Sir

Cecil Hurst's on Nationality of Claims, it is certainly from no lack of appreciation of their importance. They are both typical of British Year Book articles. They investigate problems likely to be of intense practical value in International Law. It is this characteristic of the Year Book that makes it so valuable. The contributors waste no time over windmills, but they have all the courage of Don Quixote in their enterprises and all the common sense that he lacked.

One final reminder. Have the editors yet considered a synthetic index to all the volumes of the Year Book?

P. H. W.

Cases On Contract. By M. E. ROWE, B.A., LL.B., of Gray's Inn, Barrister-at-Law. 1927. Stevens & Son, Ltd. pp. xix, 392. 15s. net.

In preparing this book, Mr. Rowe, a former editor of the Cambridge Law Journal, has adopted a principle which is comparatively novel. Instead of providing the student with the greater part of the full report, as is done by most of the standard case-books, he gives only a summary of the facts and the passage in the judgments which most concisely summarises the law laid down. As a result, Mr. Rowe is able to include a surprisingly large number of cases within a short compass. His statement of the facts is admirable; he succeeds in being clear without having to sacrifice any of the essential points involved. The passages from the judgments are well chosen, but in some of the cases they seem to us to be unduly clipped, even remembering the narrow limits which the author has set for himself. In choosing his cases Mr. Rowe has shown considerable originality, for he has included a large number of cases which have not previously appeared in a case book. The catchwords which describe the various principles involved are accurate, and will not mislead the student as catchwords sometimes have a tendency to do.

This book will prove of undoubted value to the student if he remembers Mr. Rowe's advice in the preface: "The wider knowledge required by the practitioner and the scholar can only be derived from the original reports." Having some one else summarise the facts in a case and reading the *ratio decidendi* which he has extracted from the judgments is useful when the memory has to be refreshed before an examination, but it is no substitute for doing the work one's self.

A. L. G.

Hongkong University Law Journal. Vol. 1, No. 1. Edited by G. W. KEETON, B.A., LL.B. 1926. Newspaper Enterprise, Ltd., Hongkong. 2s. 6d. post free.

It is with pleasure that we welcome the first number of the Hongkong University Law Journal. When much of the news from China is depressing, this legal periodical comes as an omen of a more peaceful future. The editorial note shows the spirit in which this new venture is undertaken. "The appearance of this Law Journal at the present time will, we hope, show to all that at least Learning is above human dissensions and discord; for, besides our immediate aim on the technical side, our remote object is to endeavour to do our duty as members of that great international body of students whose labour is to try and understand those light-giving principles of Reason." Mr. Keeton, a former editor of the Cambridge Law Journal, has done his editorial work well and supplies two articles of interest. We particularly enjoyed Miss Ho Tung's paper on "Some Leading Principles of Chinese Law Historically Considered," and Mr. Lai Pin Cheung's "Primitive and Patriarchal China." We were, however, unable to verify the citations in Chinese script.

A. L. G.

Forensic Fables. By O. Butterworth & Co., London. pp. xiii, 99. 2s. 6d. net.

These fables were first published in the Law Journal. In book form they make even more delightful reading, for the tables of cases and of statutes and the index are, if anything, better than the text itself. In the table of cases we find "*Lickbarrow v. Mason*, 5 T.R. 683 . . . page 52," but when we turn to page 52 the reference is "He Tried Unsuccessfully to Remember What had been Held in *Lickbarrow v. Mason*." It is always a pleasure for a reviewer to find that his own understanding of a case is substantially adopted in the book he is considering. The table of statutes is of a reasonable length which other text-book writers would do well to emulate. It contains only one citation—Slander of Women Act, 1891 (54 & 55 Vict. c. 51). The index has been prepared in a careful and scholarly manner. The cross-references are admirable; thus we find "Grump, Mr. Justice, retirement to rest of, 52," and under another heading "Rest, retirement to, of Mr. Justice Grump, 52."

It is, of course, purely a question of personal taste as to which of the fables is the most amusing. At a time, however, when many of us are being invited "to spot the winner," we give our order of preference as 1. The Two Aged Conveyancers and the Good Story; 2. The Blushing Beginner and the Bearded Juryman; 3. The Common Law Junior and the Originating Summons.

We hope that no foreign reader will take this book seriously. If he does, he will be led to the conclusion that the English system of justice is peculiarly haphazard in its results.

A. L. G.

Elliot's Workmen's Compensation Acts. Ninth edition. By MONTAGUE BERRYMAN. London. Sweet & Maxwell, Ltd. £2 2s. net.

Following so closely on its predecessor this addition of Elliot on Workmen's Compensation provides little material which needs fresh comment. The new features are occasioned by differences in arrangement consequent upon the consolidation of the law on Workmen's Compensation by the Act of 1925. While adhering to the new numbering of the sections the edition has maintained a serviceable contact with the classification under the Acts of 1906-23, both by an initial comparative table and by marginal notes. The familiar structure of the work is, however, successfully preserved.

It is impossible to follow all the changes first introduced by the Act of 1925. Provisions as to notice (now permissible orally as well as in writing, Section 14 (3), W.C.A., 1925) and the period of disablement which forms a basis for compensation do not call for discussion. But practitioners will be indebted to the editor of the present work for his convenient collection of cases and illuminating comments on what is now Section 1 (2) of the Act of 1925 (Section 1 (7) of the Act of 1923), that section which was characterised by Atkin L.J. in his judgment in *Davies v. Gwaencae-gurwen Colliery Co.* (1924) 2 K.B. p. 651 as "likely to prove a gilt-edged section for the legal profession." Generally on the vexed question of the course or scope of employment this work is helpful.

The new amending Act of 1926, which was made necessary by the case of *Jones v. Meiros Collieries, Ltd.*, 96 L.J. (K.B.), is inserted by means of a slip and thus the work is brought up to date. The Appendices are a particularly valuable feature of the book, including as they do the Workmen's Compensation Rules of 1926, the regulations referring to Medical Referees and Certifying Surgeons and the list of various Statutory Orders made in exercise of powers conferred by the Workmen's Compensation Acts.

The work is conveniently arranged and is made all the more attractive by the useful variety of type.

R. M. H.

Notes on Perusing Titles and on Practical Conveyancing. By L. E. EMMET. Eleventh edition, in two volumes. The Solicitors' Law Stationery Society, Ltd. 1926. Vol. I, pp. lx, 1-589. 1927. Vol. II, pp. 591-1068. £2 10s. net.

Mr. Lewis Emmet, a practising solicitor of Sheffield, first published his *Notes on Perusing Titles* in 1895. Ever since we first became acquainted with his work we have regarded it with respectful admiration. His tenth edition, in 1923, was at the time the only book which really got to grips with the new legislation. The preface to the eleventh edition reveals one of the causes of his success. He tells us that he typed the material personally about six times over before he got it into anything like presentable condition. How many men writing as part of their ordinary work would have had such determination? And how much more remarkable is it in one whose only time available has been his holidays and the hours between 8 p.m. and 4 a.m.?

The present work is virtually a new book. It is doubled in size and fills two volumes. It bears the enlarged description, *Notes on Perusing Titles and on Practical Conveyancing*. The author is careful to explain that the book remains a collection of notes and is not a systematic treatise. It loses nothing thereby. Its outstanding merit is that the author gets into the mind of the student, academic or practical, visualises the problems which are likely to confront him, and is not content without presenting an explanation that is as lucid and satisfying as he can make it. Where else could anyone requiring information as to the duties of a purchaser's solicitor on receipt of an abstract of title find it given as clearly and fully as in Chapter vii?

Mr. Emmet's handling of the massive material provided by the 1925 legislation is masterly. Perusal of commentaries on sections of the new Acts has often made us regard them as perfunctory. Too often they repeat in small type what the section has already said in large. Too often they avoid difficulties which lie beneath the surface, or display timidity in approaching them. Not so Mr. Emmet. He was obliged to abandon his intention to give a concrete example at the end of every section of the new Acts, but the fact that he formed that intention shows the spirit in which he undertook his task. He approaches the Acts as one who has to work them, and not as an Olympian.

The second volume is appearing as we go to press and it has, of course, not been possible to do more than glance at it. The following merits, however, which we expected, are apparent at first sight. Due treatment is given to trusts for sale (pp. 972 ff), and Mr. Emmet is the only text-writer of whom it can be said that he has met this need. Then there is a reprint of the Law of Property (Amendment) Act, 1926, with a commentary on each amendment, which will be found invaluable. And, further, there are several pages of *addenda et corrigenda* which make the references to cases complete up to the last possible moment.

Mr. Emmet's work places him in the same class, in respect of claims upon our gratitude, with Mr. Lightwood, the learned editor of the "Law

Journal" and author of the series of letters on conveyancing in that paper. No one else, so far as our reading goes, has rivalled these two men in rendering the laborious service of lightening the darkness from on high which encompasses our generation.

H. A. H.

GODEFROI on the *Law of Trusts and Trustees*. Fifth edition. By HAROLD GREVILLE HANBURY, B.C.L., Fellow of Lincoln College, Oxford. 1927. Stevens & Sons, Ltd. pp. cxlvi, 827. £2 10s. net.

We extend a most cordial welcome to Mr. Hanbury, one of the foremost among the younger generation of lecturers of the Oxford Law School, on his appearance in the ranks of legal writers, even in the thankless post of editor of a standard treatise.

Such a rôle is in present circumstances more than usually difficult when the subject concerns the law of property, so that the statutory provisions of 1925 have to be blended with the previous law. Mr. Hanbury has attempted to effect the necessary fusion sometimes by re-writing, as in the case of those parts dealing with the Settled Land Acts, but more often by retaining the old text and adding to it a statement of the new law. There are some fairly serious objections to the latter course. It is effective enough if the book is read as a whole, but such books seldom are. To the searcher for a particular piece of information it is apt to be a snare. For instance, the retention (on p. 82) of the statement regarding 13 Eliz., c. 5, that "by this Act all settlements made with an intention to delay, hinder or defraud creditors are *ipso facto void*" is rather misleading in view of the fact (duly stated on p. 88) that the statute has been repealed and that under the provisions which replace it in the Law of Property Act the conveyance is voidable, not absolutely void.

Again, the retention on p. 198 of the passage, "The trust or confidence reposed in a trustee is strictly personal in its character, and the duties connected with it must therefore be performed by him personally; and he is permitted by the rules of the Court to employ and rely upon agents only in cases in which a prudent man, acting for himself, and in the ordinary course of business usually employs them, provided that the employment is within the scope of the business of the agent himself; that at the time of his appointment he is a person of good credit and reputation, . . ." consorts ill with the preceding page. There, after setting out the text of section 23 of the Trustee Act, 1925, the editor comments: "It remains to be seen what the nature of this innovation will be; it is submitted that it will revolutionise this particular branch of the Law of Trusts by dispensing [with] trustees from the maxim *delegatus non potest delegare*; it is no mere occasional employment of certain special agents for special purposes, but a general delegation of

any kind of business of the trust to an agent chosen by the trustee himself, that is contemplated by these two sub-sections. Not even the usual standard of care in the choice of an agent is insisted on, at any rate in cases falling under sub-section (1), the trustee only being required to 'act in good faith'."

Trusts for sale play a very big part, as Mr. Hanbury tells us on p. 360, in the legislation of 1925. They have for many years played an equally big part in the sphere of practical dealings with property, and in view of that fact it is extraordinary how sparse are the references to them in legal literature. There was only one mention of them, and that casual, in the fourth edition, and in spite of the editor's comment quoted above they find but scanty lodgement in the fifth. The index refers us only to p. 311 which deals with the mode in which trustees must carry out a sale, and fails to note the important pp. 360 to 365. But those pages contain unfortunately only the text of sections 23-33 of the Law of Property Act, 1925. It is submitted that there ought to have been a separate chapter on the subject of trusts for sale, and that it ought to have contained, *inter alia*, reference to the cases which differentiated trusts for sale from powers for sale.

Unfortunately the fourth edition contained no table of statutes, and the editor and publishers have not realised how much such a table facilitates, in a modern book on the law of property, search for comment on the several sections of the new statutes.

We hope that the editor's labours have attracted him permanently to the subject, and that when this edition grows out of date the publishers will substitute for Godefroï (for there must be an end to even the best of treatises) a book of Mr. Hanbury's own.

H. A. H.

OTHER BOOKS RECEIVED.

DAVEY (HERBERT).—*Rating and Valuation Act, 1925 (and Incorporated Statutes) with Statutory Rules, Orders, etc.* 1926. Stevens & Sons, Ltd. pp. xxvii, 464. £1 net.

FORTESCUE-BRICKDALE (SIR CHARLES).—*Land Registration Act, 1925, with Rules, 1925, etc.* Third edition. By SIR CHARLES FORTESCUE-BRICKDALE and JOHN STEWART STEWART WALLACE. 1927. Stevens & Sons, Ltd. pp. xlii, 823. £2 10s. net.

GERSTENBERG (CHARLES W.).—*Constitutional Law.* A brief text-book with leading and illustrative cases. 1926. New York: Prentice Hall, Inc. pp. xv, 562. \$5.00.

KONSTAM (E. M.).—*Sup. to Law of Income Tax* (third edition); *Account of Changes made by Act of 1926, and Decisions reported in 1926*. 1927. Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. pp. vii, 62. 3s. net.

LIECK (ALBERT) and A. C. L. MORRISON.—*Matrimonial Jurisdiction of Justices*. Solicitors' Law Stationery Society, Ltd. pp. x, 262. 12s. 6d. net.

MCCARTY (DWIGHT G.).—*Law Office Management*. 1926. New York: Prentice Hall, Inc. pp. xiv, 386.

MATSUNAMI (DR. N.).—*The Publication of the Immunity of State Ships and its Sequences*. (Monthly in Japanese, but parts of it in French and English.) To be obtained from the Author, Dr. N. Matsunami, Tokyo Imperial University, Tokyo.

PALMER (F. B.).—*Company Precedents in Relation to Companies Acts, 1908-1917*. Part I—General Forms. Notes, App., Acts, and Rules. 13th edition. ALFRED F. TOPHAM and ALFRED R. TAYLOUR. 1927. Stevens & Sons, Ltd. pp. clxii, 1726. £3 10s. net.

WESTBY-NUNN (G.).—*The Secretarial Handbook*. Being a practical guide to Secretary's Duties under the Companies Acts. 1926. Solicitors' Law Stationery Society, Ltd. pp. 222. 6s. net.

HOLDSWORTH (W. S.).—*Professor Sir Paul Vinogradoff, 1854-1925* (from Proceedings of the British Academy). Published for British Academy by Oxford University Press. pp. 16. 1s.

